

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF SOUTH CAROLINA
3 COLUMBIA DIVISION
4 C.A. No. 3:05-CV-2858-MJP

5
6
7 UNITED STATES OF AMERICA, ex rel.,
8 MICHAEL K. DRAKEFORD, M.D.,
9 Plaintiff(s),

10 v.

11 TUOMEY d/b/a TUOMEY HEALTHCARE
12 SYSTEM, INC.,
13 Defendant(s).

14
15 DEPOSITION OF KEVIN G. MCANANEY, ESQUIRE
16 Washington, DC
17 Thursday, October 9, 2008
18 10:00 a.m.

19

20 Job No. 10128

21 Volume I Pages 1-162

22 Reported by: Linda S. Kinkade, CSR, RMR, CRR

CERTIFIED COPY

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 2

1

2

Deposition of KEVIN G. MCANANEY, ESQUIRE held

3

at the offices of:

4

5

6

United States Department of Justice

7

Civil Division

8

601 D Street, N.W.

9

Washington, DC

10

11

12

13

Pursuant to applicable Rules of Civil

14

Procedure, before Linda S. Kinkade, CSR, RPR/RMR, CRR,

15

a Notary Public, in and for the District of Columbia.

16

17

18

19

20

21

22

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 3

1 APPEARANCES:

2 On Behalf of the United States:

3 G. NORMAN ACKER, III, ESQUIRE

4 Special Attorney and

5 Assistant United States Attorney

6 Eastern District of North Carolina

7 310 New Bern Avenue, Suite 800

8 Raleigh, North Carolina 27601

9 Telephone: (919) 856-4530

10 E-mail: norman.acker@usdoj.gov

11

12 TRACY L. HILMER, ESQUIRE

13 NIALL M. O'DONNELL, ESQUIRE

14 Attorneys, Civil Division

15 United States Department of Justice

16 601 D Street, N.W.

17 Washington, DC 20044

18 Telephone: (202) 307-0474

19 E-mail: tracy.hilmer@usdoj.gov

20 E-mail: niall.odonnell@usdoj.gov

21

22

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 4

1 APPEARANCES (continued):

2

3 On Behalf of Defendant Tuomey Healthcare System,
4 Inc.:

5 A. CAMDEN LEWIS, ESQUIRE

6 MARY G. LEWIS, ESQUIRE

7 Lewis & Babcock, LLP

8 1513 Hampton Street

9 Columbia, South Carolina 29211

10 Telephone: (803) 771-8000

11

12

13 DANIEL M. MULHOLLAND, III, ESQUIRE

14 Horty, Springer & Mattern

15 4614 Fifth Avenue

16 Pittsburgh, Pennsylvania 15213

17 Telephone: (800) 245-1205

18 E-mail: dmulholland@hortyspringer.com

19

20

21 Also present: Brett Elliott, Jo Williamson, Jay Cox,

22 Kevin Barry, (telephonically) Agent Brian Dimler

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 5

1 I N D E X

2

3 EXAMINATION OF KEVIN G. MCANANEY, ESQUIRE PAGE

4 BY MR. ACKER 7

5

6

7 E X H I B I T S

8 (Attached to transcript)

9

10 EXHIBIT DESCRIPTION PAGE

11 1 Documents Bates labeled 006-1 6

12 through 006-194, inclusive

13 2 Stipulation 19

14 3 Documents provided by witness at 52

15 deposition (to be Bates labeled)

16

17

18

19

20

21

22

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 6

1 P R O C E E D I N G S

2 (Exhibit No. 1 marked for identification and
3 attached hereto.)

4 THE REPORTER: Counsel, if you could state
5 your appearances for the record, please.

6 MR. ACKER: Norman Acker with the United
7 States Attorney's Office.

8 MS. HILMER: Tracy Hilmer with the United
9 States Department of Justice, Civil Division.

10 MR. O'DONNELL: Niall O'Donnell with the
11 United States Department of Justice, Civil Division.

12 MR. BARRY: Kevin Barry with the Office of
13 Counsel to the Inspector General and HHS.

14 MS. ELLIOTT: Brett Elliott, Civil Division.

15 MR. COX: Jay Cox, Tuomey Healthcare.

16 MS. LEWIS: Mary Lewis of Lewis & Babcock
17 here on behalf of Tuomey Healthcare.

18 MS. WILLIAMSON: Jo Williamson, Tuomey
19 Healthcare.

20 MR. LEWIS: Cam Lewis of Lewis & Babcock
21 here for Tuomey.

22 MR. MULHOLLAND: Dan Mulholland from Horthy,

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 7

1 Springer and Mattern representing Tuomey.

2 THE REPORTER: And on the telephone?

3 MS. HILMER: Brian Dimler, special agent

4 with the Office of Inspector General for the

5 Department of the Health and Human Services.

6 (10:13 a.m.)

7 KEVIN MCANANEY, ESQUIRE,

8 Being first duly sworn, testified as follows:

9 EXAMINATION

10 BY MR. ACKER:

11 Q Would you state your name for the record?

12 A Kevin McAnaney.

13 Q And what town do you live in?

14 A Bethesda, Maryland.

15 Q And where do you work?

16 A At 1800 K Street, Washington, DC.

17 Q And what do you do for a living?

18 A I'm a lawyer.

19 Q Are you in solo practice?

20 A I am.

21 MR. MULHOLLAND: Mr. Acker, before you get

22 very far, I just want to put an objection on the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 8

1 record relevant to this deposition. Tuomey would like
2 to have the following objections on the record.

3 First, as we state in our motion to preclude
4 evidence under Federal Rules of Evidence 408,
5 Mr. McAnaney was jointly retained by Tuomey and
6 Palmetto Orthopaedics to provide a means of settling a
7 dispute between those parties. Furthermore, at the
8 conclusion of his engagement, he was instructed not to
9 perform any further services in connection with this
10 matter. Therefore, anything that he did in connection
11 with the joint engagement is privileged. Furthermore,
12 he was not authorized to do anything beyond September
13 2nd, 2005. So even this deposition is not authorized
14 and any of his testimony would be privileged as well
15 under the attorney-client and attorney work-product
16 privileges that Tuomey can assert. Tuomey reserves
17 the right to move to strike Mr. McAnaney's testimony
18 today.

19 Second, in the government's response to
20 Tuomey's interrogatories, the government listed
21 matters that Mr. McAnaney has knowledge about. We'll
22 object to the extent that the government asks

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 9

1 Mr. McAnaney about matters that go beyond the matters
2 set forth in its response to our interrogatories.

3 And, furthermore, we'll object to the extent
4 that the government attempts to use Mr. McAnaney's
5 testimony today at trial except as permitted by
6 Federal Rule of Civil Procedure 32.

7 In addition, to the extent that the government
8 attempts to qualify Mr. McAnaney as an expert and ask
9 him for expert testimony or opinion, we'll object to
10 the extent that the procedures for identifying and
11 disclosing expert opinions have not yet been followed
12 by the government.

13 Just wanted to put that on the record.

14 One other objection that we believe -- and
15 we'll make this clear in a future filing in the
16 court -- we believe that the government's responses to
17 the interrogatories in terms of what Mr. McAnaney
18 might testify about were inadequate.

19 MR. ACKER: Mr. Mulholland, can I ask a
20 clarification?

21 MR. MULHOLLAND: Sure.

22 MR. ACKER: You indicated privilege a couple

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 10

1 of times in which you stated one time you were
2 specific in naming the attorney-client privilege and
3 the work-product privilege. Are there any other
4 privileges that you are claiming?

5 MR. MULHOLLAND: The other privilege is
6 under Federal Rules of Evidence 408 as set forth in
7 our prior pleadings with the court relative to the
8 motion to preclude evidence in our motion to strike,
9 which the judge, I believe, has held in abeyance. He
10 didn't grant that nor, as I understood, did he deny
11 that motion with prejudice.

12 MR. ACKER: And it's my understanding that
13 this is a continuing objection to all the questions
14 and that we will not require you to make an objection
15 at each question.

16 MR. MULHOLLAND: That's correct. And if
17 that's understood, we won't need to do so.

18 MR. ACKER: That's understood.

19 THE WITNESS: May I ask? I thought the
20 privilege was waived.

21 MR. ACKER: We'll ask you about that.

22 THE WITNESS: Okay.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 11

1 BY MR. ACKER:

2 Q Let me start off by asking, have you ever
3 had your deposition taken before?

4 A Yes.

5 Q And how many times have you had your
6 deposition taken approximately?

7 A Maybe three, four at most, something like
8 that.

9 Q In what capacity did you have your
10 deposition taken?

11 A I think this is probably my second time as
12 a fact witness and once -- and then I guess twice as
13 an expert.

14 Q Okay. Let me just give you a few
15 instructions at the beginning. First, I need to
16 remember this as well, but we do have Mr. Dimler on --
17 Special Agent Dimler on the phone. So both of us need
18 to keep our voices up as loud as possible so that he
19 can hear. Okay?

20 A That's fine. I'm from a big family. We
21 yell a lot.

22 Q The other thing is that the court reporter

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 12

1 is here taking down everything that we say. And so
2 make sure that you respond orally with your answers.
3 Okay?

4 A Yes.

5 Q If I ask you anything that is confusing or
6 unclear, then feel free to ask me to repeat the
7 question or to clarify the question.

8 A Okay.

9 Q And one of the objections that
10 Mr. Mulholland stated was in terms of attorney --
11 excuse me -- opinion testimony. And it is my
12 intention to only ask you the opinions that you formed
13 at the time of your engagement in the summer of 2005
14 and not any other opinions that you've formed since
15 that time. Do you understand that?

16 A Yes.

17 Q And if I ask you any question that you
18 believe calls for speculation or is something you had
19 not formed an opinion about back in 2005, feel free to
20 tell me that you think that calls for speculation,
21 that you haven't had a chance to review that
22 thoroughly, and just inform me of that, if that's the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 13

1 case.

2 A I will.

3 MR. MULHOLLAND: Just to be clear, our
4 objection would apply to any opinions he had in 2005
5 as well as any subsequent to that.

6 MR. ACKER: I understand your objection.

7 BY MR. ACKER:

8 Q I will note for the record that you do not
9 have an attorney present with you; is that correct?

10 A That's correct.

11 Q And you understand, if you wanted to, you
12 could have an attorney with you?

13 A Yes.

14 Q All right. Let's get started with your --
15 the other instruction is, if you need to take a break
16 at any time, please let us know. We'll take a break
17 at any time that you need to. And don't hesitate to
18 ask that.

19 A I will.

20 Q Let's start with your background. Tell me
21 about your educational background starting with
22 college.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 14

1 A I went to UNC, Chapel Hill, graduated in
2 January of 1971. I went to -- I went to law school.
3 I graduated from Columbia Law School in New York City,
4 class of 1977. And since then have practiced law.

5 Q And tell me about your employment history
6 practicing law since '77.

7 A Following law school I went to a -- I was
8 an associate in a firm, Kelley, Drye & Warren in New
9 York City, where I worked for several years -- three,
10 four years. I then was assistant counsel to the
11 governor of New York, Hugh Carey, from about '81, '82.
12 I then came -- I then worked at, as an associate at
13 the law firm of Dewey, Ballantine & Warren in
14 Washington, DC.

15 Q Approximately what years was that?

16 A Well, I think I came down in -- well, I
17 came down in '82 or '83, and I worked there until
18 January '97, I think. And then at some point in there
19 after about three years I was a partner, I became
20 partner. Was a partner there for about, I don't know,
21 10, 11 years, I think.

22 I then, in 1997, I went to work at the Office

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 15

1 of the Inspector General, counsel's office, and I
2 worked there for six years until May, I think, 2003.
3 I think it was May 2003. And then since then I've
4 been in private practice, solo practice.

5 Q Do you recall in the summer of 2005 being
6 employed by Tuomey Hospital and Palmetto Orthopaedics?

7 A Well, I remember the engagement. The time,
8 I'm not exactly sure what the time is without looking
9 at the papers, but, yes.

10 Q Let me hand you what's been marked McAnaney
11 Deposition Exhibit 1. And this consists of a number
12 of pages. The page numbers -- there is a Bates number
13 at the bottom that starts with 006-1 through 006-194.
14 Is that what you have before you?

15 A Yes.

16 Q And does this appear to be the documents
17 that you provided to the United States in an interview
18 that you gave on or about November 1 of 2006?

19 A Yes.

20 Q And does this constitute documents that you
21 had in your file for this engagement?

22 A Yes.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 16

1 Q All right. Take a look at page 006-13.

2 What is this, the two pages, 006-13 and 14? What is
3 this?

4 A It's a copy of my engagement letter.

5 Q Does this set out the terms of your
6 engagement?

7 A Yes.

8 Q And who is it addressed to?

9 A Mr. Jay Cox at Tuomey Healthcare System and
10 Dr. Mike Drakeford at Palmetto Orthopaedics and
11 Sports.

12 Q And this is dated May 6th, 2005?

13 A Yes.

14 Q Does that refresh your recollection as to
15 when your engagement was with this matter?

16 A Yes.

17 Q So have you reviewed this letter recently?
18 Take a minute to read it over.

19 A Okay. Yes.

20 Q After reading that, tell me in your own
21 words your understanding of what you were hired to do.

22 MR. MULHOLLAND: Again, we have not waived

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 17

1 the attorney-client privilege with respect to any
2 matters that Mr. McAnaney was engaged in. I would
3 just instruct him of that fact.

4 MR. ACKER: Well, let me, then, back off
5 that question for a moment that I asked you and ask
6 you --

7 BY MR. ACKER:

8 Q Did there come a time when you had a
9 conversation with a Mr. Bart Daniel concerning this
10 matter?

11 A Yes.

12 Q And who was Bart Daniel? Who is your
13 understanding of who Bart Daniel was?

14 A He was -- I understood him to be counsel
15 representing Tuomey.

16 Q And what did he indicate to you about any
17 waiver of attorney-client privilege in this matter?

18 A He told me that Tuomey had waived the
19 privileges as to my -- to this matter, to my
20 representation, and that I could meet with you back in
21 2006.

22 MR. MULHOLLAND: And, again, the retention

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 18

1 letter talks about joint instructions relative to
2 Mr. McAnaney, both from Palmetto and from Tuomey.

3 MR. ACKER: Okay. Are you claiming the
4 privilege on behalf of Palmetto?

5 MR. MULHOLLAND: No. I'm just saying that
6 the joint retention of Mr. McAnaney referred to joint
7 instructions and required, as I understand it -- and
8 he can testify about his understanding obviously --
9 the agreement of the parties relative to any waiver of
10 privilege.

11 BY MR. ACKER:

12 Q Was it your understanding before you spoke
13 to us in 2006 that Palmetto Orthopaedics had also
14 waived the privilege?

15 A Yes.

16 MR. ACKER: Mr. Mulholland, are you
17 instructing the witness not to answer or are you
18 simply preserving your objection for the record?

19 MR. MULHOLLAND: We're preserving our
20 objection for the record, but I think the joint
21 instructions that were given to him at the time of his
22 retention are clear. But, you know, we have not

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 19

1 withdrawn any of the objections that I stated at the
2 beginning of the deposition.

3 MR. ACKER: Okay. So it's your --

4 MR. MULHOLLAND: So we would instruct him
5 not to answer, but from his standpoint, you know, if
6 he follows those instructions, fine. If he doesn't
7 follow the instructions, we'll take it up later.

8 MR. ACKER: Let's go off the record.

9 (Discussion was had off the record.)

10 (Proceedings recessed at 10:28 a.m.)

11 (In session at 12:19 p.m.)

12 (Telephone call placed by counsel Tracy

13 Hilmer.)

14 (Exhibit No. 2 marked for identification and
15 attached hereto.)

16 MR. ACKER: Just for the record we want to
17 say that we've, during the break, worked out a
18 stipulation regarding the testimony of Kevin McAnaney
19 and we've added to the deposition for the purpose of
20 this stipulation and one other matter Nick Lewis, who
21 is one of the attorneys representing the relator in
22 this matter, Dr. Michael Drakeford.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 20

1 Are you there, Nick?

2 COUNSEL APPEARING BY TELEPHONE: I am. For
3 purposes of the record, this is Nick Lewis. I'm with
4 Ballenger, Barth & Hoefer in Florence. We're
5 attorneys for the relator.

6 MR. ACKER: All right. And what I'm going
7 to do is read the stipulation, which we have marked as
8 Deposition Exhibit 2.

9 Stipulation regarding testimony of Kevin
10 McAnaney.

11 The parties stipulate to the following:

12 1. The mere acts of, (a), going forward with
13 the deposition of Kevin McAnaney and, (b), the
14 defendant's attorneys withdrawing their instruction to
15 Kevin McAnaney not to answer the questions do not
16 waive any of the following privileges or rights that
17 the defendant may have as of this date, October 9,
18 2008:

19 (i) attorney-client privilege;

20 (ii) work-product privilege;

21 (iii) any privilege or right which may have
22 been created by the May 6, 2005 engagement letter

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 21

1 among Kevin McAnaney, defendant and the relator; and
2 (iv) any privilege or right which may exist
3 pursuant to Federal Rules of Civil Procedure 408 --
4 that's what the stipulation says, but I think we
5 should stipulate it should be the Federal Rules of
6 Evidence, Rule 408.

7 COUNSEL APPEARING BY TELEPHONE: Yes.

8 MR. MULHOLLAND: That's correct.

9 MR. ACKER: Do all the parties agree that
10 that should be corrected on this stipulation?

11 MR. MULHOLLAND: Yes.

12 MR. LEWIS: Yes.

13 COUNSEL APPEARING BY TELEPHONE: Yes.

14 MR. ACKER: No. 2. The mere fact that the
15 government and the relator are entering into this
16 stipulation does not constitute an admission by the
17 government or the relator that any such privileges or
18 rights exist as of this date, October 9, 2008.

19 No. 3. The mere fact that Mr. McAnaney answers
20 questions put to him in this deposition shall not be
21 grounds for any civil or administrative action,
22 complaint or proceeding, concerning:

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 22

1 (a) any violation of the applicable rules of
2 professional responsibility, or

3 (b) any obligation which may have been created
4 by the May 6, 2005 engagement letter. None of the
5 parties to this stipulation or their attorneys or
6 agents will bring any such civil or administrative
7 action, complaint or proceeding against Mr. McAnaney
8 or assist anyone else in doing so.

9 That's the end of the stipulation. I'd just
10 ask for each attorney one at a time to agree that, on
11 behalf of their clients and themselves, that -- to
12 this stipulation.

13 The government, Norman Acker on behalf of the
14 Government, agrees.

15 MR. MULHOLLAND: Tuomey -- this is Dan
16 Mulholland -- also agrees subject to the understanding
17 that the objections we entered at the start of the
18 deposition are still in effect and continuing.

19 MR. ACKER: We agree that those are
20 continuing objections. And Nick?

21 COUNSEL APPEARING BY TELEPHONE: This is
22 Nick Lewis, and I'd like to state for the record that

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 23

1 Palmetto Orthopaedics, Dr. Drakeford are waiving
2 privilege as to Kevin McAnaney. We also agree to the
3 stipulation just read into the record regarding the
4 testimony of Kevin McAnaney.

5 MR. ACKER: Is there anything else that we
6 need to put on the record as to this matter?

7 MR. LEWIS: No.

8 MR. MULHOLLAND: Don't believe so.

9 COUNSEL APPEARING BY TELEPHONE: No.

10 MR. ACKER: Nick, do you want to continue on
11 or do you want to be dropped out of the conference at
12 this point?

13 COUNSEL APPEARING BY TELEPHONE: You can
14 drop me. That will be fine.

15 MR. ACKER: Okay. Thank you.

16 COUNSEL APPEARING BY TELEPHONE: Thank you.

17 EXAMINATION (resumed)

18 BY MR. ACKER:

19 Q Mr. McAnaney, I think the question before
20 you was, on Exhibit 1, page 006-13 and 14, you had
21 testified that this is your engagement letter to -- on
22 this matter; is that correct?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 24

1 A Yes.

2 Q And I ask you to describe in your own words
3 what's your understanding of what you were hired to
4 do.

5 A My understanding was that the two parties
6 would submit -- submit material to me about a proposed
7 arrangement or proposed arrangements that they were
8 discussing between themselves and to -- for me to not
9 to opine on their legality but to basically give them
10 an assessment -- let me exactly say what it was
11 because it was -- basically to review it. I don't see
12 it quite here, but to review it and give them an
13 assessment as to what I thought of the arrangement in
14 terms of how it related to the federal anti-kickback
15 and Stark statute and possible compliance --

16 Q Okay.

17 A -- issues.

18 Q Now, when you said you didn't see it here,
19 just for clarification, you're looking at the exhibit
20 that I just mentioned, pages 6-13 and 6-14?

21 A Yes.

22 Q Okay.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 25

1 MR. ACKER: One housekeeping matter we
2 probably need to take care of is to add Mr. Dimler
3 back on, Special Agent Dimler. So can we do that?

4 (Telephone call placed by Mr. O'Donnell.)

5 MR. O'DONNELL: Brian, are you there?

6 APPEARING BY TELEPHONE: Yes, I'm here.

7 BY MR. ACKER:

8 Q All right. Mr. McAnaney, if you'll look at
9 the last sentence of the first paragraph, could you
10 read that?

11 A Yes. I will report orally my conclusions
12 as well as an evaluation of any potential compliance
13 issues.

14 Q Is that what you were recalling earlier --

15 A Yes.

16 Q -- that you were going to report to them
17 your assessment?

18 A Yes, it is.

19 Q Okay. And was it your understanding --
20 what capacity were you acting as in this?

21 MR. MULHOLLAND: Object to the form of the
22 question.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 26

1 BY MR. ACKER:

2 Q You may answer.

3 A I'd say -- I mean, loosely speaking, sort
4 of a -- I don't know if it's a tie-breaker, but an
5 independent judgment. I think the two parties were
6 assessing it separately and they were having trouble
7 coming to a consensus view.

8 Q Were you acting as an attorney?

9 A Yes. Well, I --

10 MR. MULHOLLAND: Excuse me. I thought he
11 had some more to say.

12 BY MR. ACKER:

13 Q Did you?

14 A Yes, I thought so.

15 Q And you indicated on this letter that it
16 was protected by the attorney-client work product and
17 subject to attorney-client privilege.

18 A Yes.

19 Q And this letter says in the first sentence
20 that you've been jointly retained to review and advise
21 the parties with respect to the proposed business
22 relationships?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 27

1 A Yes.

2 Q Was there ever any time when you were asked
3 by the parties to serve as a mediator?

4 MR. MULHOLLAND: I'll object to the form of
5 the question.

6 BY MR. ACKER:

7 Q You can answer.

8 A Not that I recall beyond what I sort of
9 described as --

10 Q Okay. If you'll look two pages before
11 that, to page 6-11 and 6-12, what is this document?

12 A This looks to be apparently a fax document
13 of the retainer letter that's been signed by Tuomey.

14 Q Okay. So Jay Cox signed the engagement
15 letter on behalf of Tuomey?

16 A Yes.

17 Q And, other than that, page 6-11 to 12
18 appears to be the same engagement letter as page 6-13
19 and 14?

20 A Yes.

21 Q Okay. And if you will, can you tell at the
22 top, is there a date that this was faxed on page 6-11?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 28

1 A Well, I see it. I actually don't know
2 whether that's mine or theirs, but, I mean, there is a
3 date of May 9th, 2005.

4 Q Okay.

5 A Yeah. And I don't know whether that's
6 coming or going.

7 Q Okay. Now, turn next to page 6-2 through
8 6-4. What is this?

9 A It's my bill.

10 Q And what's the date of the bill?

11 A July 5th, 2005.

12 Q And on page 6-2, it says, statement of
13 account for your legal services; is that right?

14 A Yes.

15 Q And it says, in connection with advice
16 relating to the federal anti-kickback statute and
17 certain proposed business arrangements.

18 A Yes.

19 Q So is it your understanding that you gave
20 legal advice to the parties?

21 A Yes, I think I'd call it that, I guess.

22 Q On page 6-4, is this a breakdown of the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 29

1 details of the time that you spent?

2 A Yes.

3 Q Some of the questions I'm going to ask you
4 deal with time frame, so I want to show you this to
5 try to help clarify in your mind the dates of some of
6 these things.

7 And so, if you could, just go through each one
8 of these starting with April 27th, 2005, and tell us
9 what you recall or what this indicates you did on that
10 date.

11 A Well, I think April 27th was the first date
12 I had this matter. I think it was a -- I mean, it was
13 a telephone call from Greg Smith of the Womble Carlyle
14 firm. And he was calling basically sort of to -- I
15 believe -- I can't recall -- I mean, to sort of begin
16 the engagement. And I believe it was sort of general
17 background to tell me that they had discussed this
18 with Tuomey and they were going to be calling me. So
19 I think -- I mean, that was basically --

20 Q Okay.

21 A -- it. I'm not exactly sure what he told
22 me at the time about the arrangement, but --

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 30

1 Q Do you recall having the conversation,
2 phone call?

3 A Not beyond a call.

4 Q You don't recall the specifics of the call,
5 but you recall having the telephone conversation.

6 A Yes.

7 Q Okay. What about May 3rd, 2005?

8 A Yes, that was -- that was a telephone call
9 with Tim Hewson, which -- he was with the Nexsen Pruet
10 firm, I believe, who's counsel for Tuomey. And I
11 think that call, again, was sort of background to sort
12 of -- the engagement and some of the basic facts, and
13 that they -- more, I think, logistics of how it was
14 going -- how it would work and what they were going to
15 send me and what they were looking for.

16 Q Okay. And did you say before who Greg
17 Smith represented?

18 A Womble Carlyle -- I think he's with the
19 Womble Carlyle firm and I believe he represented
20 Palmetto Orthopaedic.

21 Q Okay. On May 27th what does that indicate
22 on your bill?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 31

1 A That -- it indicates that on that day I
2 reviewed the materials that they had sent me, which
3 were certain employment contracts and I believe some
4 opinions.

5 Q How did you get the materials that you
6 reviewed?

7 A I'm not sure. I think there is some in
8 here. I believe they came from Tim Hewson.

9 Q Did the engagement letter indicate that
10 both parties had the right to give you information?

11 A I have to --

12 Q Back on pages 13 and 14.

13 A Yes, I believe that -- I now recall that
14 the way it worked was they could both send me things
15 so long as I was free to share it with the other
16 party.

17 Q And if the -- one of the parties
18 specifically asked you to keep certain portions
19 confidential, you could do that as well?

20 A Yes.

21 Q Did you get information from both sides?

22 A Well, I believe I got some -- well, I

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 32

1 believe most of the documents came from Nexsen Pruet
2 because they were the hospital's documents. I had
3 some information orally from both sides as well, sort
4 of during the course of the telephone conferences.

5 And then -- and then there was information during the
6 telephone conferences between ourselves following up.

7 Q Okay. And according to the engagement
8 letter, was there anything wrong with you talking
9 independently with either side?

10 A Not that I understood.

11 Q Okay. What about May 31st, 2005, what does
12 your bill show on page 006-4?

13 A It, again, shows that I reviewed the
14 contracts and the opinions and I had a telephone call
15 with Greg Smith regarding some background information.

16 Q And what is that .4 after that?

17 A I was just breaking it out just myself.
18 That was the time.

19 Q So .4 of the 2.4 hours was the telephone
20 call?

21 A Yes.

22 Q And on June 21st?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 33

1 A That was just additional time that I spent
2 reviewing material.

3 Q Now, on June 22nd and 23rd, what happened
4 on June 22nd and June 23rd?

5 A Well, at some point -- I mean, the first
6 thing was reviewing employment contracts. I think
7 they may have sent additional material that was a
8 slightly different arrangement dealing with an
9 outpatient surgery center. I can't recall. There
10 were two different alternatives. And then on the 22nd
11 and the 23rd, I think we basically -- on the 22nd
12 there was a long -- I had some preparation and then a
13 conference call extended with both Greg Smith and Tim
14 Hewson to go through those matters. And, again, I'm
15 not exactly sure if it was one or both.

16 And then on the 23rd we had another long
17 conference call. And this had Greg Smith, Tim Hewson,
18 and then I think two attorneys from the Hall Render
19 joint venture. And now that I see, that says the
20 joint venture. I think perhaps on the 22nd we talked
21 about the employment contracts. And I think perhaps
22 on the 23rd we talked about the joint venture.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 34

1 Q Okay. And do you recall if Steven Pratt
2 was one of the people from Hall Render?

3 A Yes.

4 Q Do you know if there was anybody else from
5 Hall Render on that?

6 A Maybe I'm wrong. I thought there might
7 have been two people with Hall Render.

8 Q Okay. But Hall Render was not on the
9 telephone call on June 22nd; is that correct?

10 A That's correct, to the best of my
11 knowledge.

12 Q Okay. While we're talking about your
13 representation in general, did there come a time after
14 these telephone conversations on June 22nd and 23rd
15 when one of the parties asked you to put your opinion
16 in writing?

17 A I believe so.

18 Q Okay. And did another party to your
19 engagement letter ask you not to put it in writing?

20 A Yes.

21 Q If you'll take a look at the first page of
22 this exhibit, 006-1, take your -- a chance to read

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 35

1 this letter to yourself.

2 Do you recall this letter?

3 A Yes.

4 Q What is this letter?

5 A It is a letter from Tim Hewson at Nexsen
6 Pruet, and it basically instructed me that there had
7 been a difference of the parties and that I was not to
8 prepare anything in writing basically until I heard
9 further from them, I mean, that -- if there was a
10 change, the two of them would get back to me.

11 Q Okay. And what's the date of this letter?

12 A September 2nd, 2005.

13 Q Let's go through some of these exhibits in
14 No. 1.

15 Let me ask you, when do you want to take lunch?

16 It's twenty till 1:00.

17 A I'm fine whenever anybody else wants to
18 take it.

19 Q All right. Let's go a little bit longer,
20 then.

21 If you'll look at page 8, 006-8, do you
22 recognize the handwriting on this page?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 36

1 A Yes.

2 Q Is it the same handwriting from page 8
3 through page 10?

4 A Yes.

5 Q Whose handwriting is it?

6 A That's my handwriting.

7 Q All right. I'm going to ask you, because
8 it's difficult sometimes to read people's handwriting,
9 to read into the record as much as you can from this
10 page.

11 A Okay.

12 Q Or actually from all three pages.

13 A Okay. In the upper right-hand corner it
14 says, TC, Greg Smith, Womble, 4-27, which is a
15 notation, I mean, to myself just when this was made.

16 Q What does TC mean?

17 A Telephone call, telephone conference.

18 Q Okay.

19 A And it says, beginning at the top --

20 Q Are these your notes from that telephone
21 call?

22 A I believe --

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 37

1 Q If you look at the page before that, page

2 7 --

3 A I believe the first page is, yes, April

4 27th. The date seems to be the same, yes.

5 Q So at least this first page are your notes

6 from the telephone call with Greg Smith.

7 A Yes.

8 Q All right.

9 A And it basically says at the top,

10 orthopedic group in Sumter. I think the next line is

11 invest in ASC Tuomey Hospital. Then the next line,

12 doctors invested in ASC. And then sort of a bracket

13 that says in hospital or urologists. And then the

14 next line is, outpatient surgery center, with two

15 entries under that, couldn't buy something -- out -- I

16 think it might be out. And then under it, other

17 alternatives.

18 Under that is, employ docs. with compensation

19 formula under it. And then under that, base salary,

20 and productivity percent of doctors' collections.

21 And then on the side there is a notation,

22 always use doctors -- always lose doctors. And then

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 38

1 underneath it always lose 20%.

2 Under that is built -- built out outpatient
3 surgery center. Underneath that, I believe it's
4 economic credentialing. And under that, it's not
5 quite -- invest in some respects, I think, provide
6 these services. I'm not sure the next line. And then
7 60/40. And then under it, netting \$75,000.

8 BY MR. ACKER:

9 Q Let me go back up to the portion kind of in
10 the middle a little bit on the left that says, always
11 lose doctors, always lose 20%. Do you know -- do you
12 recall what you meant by that?

13 A Well, I believe this is my trying to take
14 notes on what Greg Smith was telling me. And I
15 believe this was a concern with the employment
16 compensation formula that was being proposed. And the
17 idea being that, under the arrangement that -- his
18 view was the compensation formula was such that the
19 hospital would always lose money.

20 Q Okay. Turn to the next page.

21 A Yes.

22 Q This is page 006-9. Do you know if this is

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 39

1 still from that same telephone conversation or from
2 something else?

3 A I do not. I can't tell if it's -- I don't
4 have a -- I can't say I have a firm practice of always
5 dating everything.

6 Q Okay. So if you could read this.

7 A It says, Tim Hinson and his phone number,
8 803-253-8204. And then the next line says, the
9 hospital through COM battle with competing application
10 to set up an ASC. Under that, denied application
11 for -- for something. I can't read the rest of it.
12 And then underneath that, urologists.

13 Underneath that, gave hospital approval for
14 four beds. And underneath that, uro's appealed on
15 access. Underneath that, single specialty ASC to
16 urology. And underneath that, attract investors from
17 other multi-specialties.

18 Q Let me ask you a question about the very
19 first line that you said. You said Tim Hinson. Is it
20 possible that that's Tim Hewson?

21 A Yes.

22 Q Okay. Is he the attorney from Nexsen

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 40

1 Pruet?

2 A Yes.

3 Q Okay. All right.

4 A Yes.

5 Q Keep reading.

6 A Then on the next line, it says, close
7 staff/noncompetes. Under that, part-time employment.

8 Under that I can't quite -- client had lots of -- it's
9 sort of -- it looks like total direct investment in
10 ASC.

11 Underneath that, jeopardize managed care
12 reimbursement rates. And under that, expenses loaded
13 into ASC.

14 The next line is, can't offer direct
15 investment. Had to meet competitive threat. Only
16 option, economic credentialing. Explore part-time
17 employment/ -- I think it says compensation
18 reasonable. Small -- I think it says small base with
19 something productivity. I don't know if
20 it's client -- something has fair market value
21 opinions. I think it might be client. I mean, it
22 looks like the same word I have there.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 41

1 Q The next page?

2 A The next page, CS, whatever that means.

3 And then -- I can't quite read the next line, the
4 first words. Something says SUP held equity.

5 Maybe -- I think the first word looks to be consultant
6 says something equity. I think it's held equity or
7 something.

8 The next line, went back to Outpatient Surgery
9 Center. I'm not sure what the first -- it's something
10 like McClutcheon/Hall Render under arrangements.
11 Under that, Newco -- and I can't quite read what's
12 next to it. And then under that, management turnkey
13 OPSC, Outpatient Surgery Center.

14 Under that, provider based/under arrangements.

15 Q Let me stop you there for just a minute.
16 This "under arrangements," is that the same thing as
17 the joint venture that you discussed earlier?

18 A Yes, I think it is.

19 Q And the Newco is part of that joint venture
20 under arrangements deal?

21 A Yeah. I think this is sort of describing
22 that. That would be it. Newco would be the entity.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 42

1 And it would provide services under -- it would be
2 provider-based and it would provide services under
3 arrangements, which are Medicare terms.

4 Q Okay. What is your understanding of what
5 "under arrangements" mean, an "under arrangements"
6 agreement?

7 A Well, an under arrangements agreement is
8 when -- well, classically, it was when another entity,
9 frequently a physicians' group, had a particular piece
10 of equipment that -- and they used it in their own
11 private practice frequently and then had -- at least
12 historically this was it -- and it was a piece of
13 equipment that, if it was already there in the
14 community, rather than have a hospital invest in their
15 own, they would basically enter into an agreement
16 under Medicare law for that entity to provide those
17 services to hospital inpatients and outpatients under
18 an arrangement with the hospital that allowed the
19 hospital to bill for that as an inpatient hospital or
20 outpatient -- typically inpatient before, but, I mean,
21 that's -- that was sort of the idea. The classic was
22 when a lot of expensive imaging equipment first came

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 43

1 up, you frequently would have a group of radiologists
2 across the street who bought it and they would just
3 provide it for both sides.

4 Q Okay. What's the next line here?

5 A Is it fair market value. And then under
6 that, KB issues, meaning kickback issues. Underneath
7 that, Dick Kusserow's firm. And then under that there
8 are other employment contracts with the same or
9 similar methodology.

10 Q Okay. Tell me what you recall about why
11 you wrote Dick Kusserow's firm.

12 A Well, I believe that whoever I was having
13 this conversation with -- and I don't -- mention as
14 part of the -- has as part of the development of this
15 proposal, they had had Dick Kusserow who has a firm --
16 he's a former Inspector General -- and he has a firm
17 that does a lot of consulting work in the healthcare
18 area -- look at the arrangement and do an assessment
19 of it, I guess.

20 Q Why did you write down, is it fair market
21 value -- or you wrote, is it FMV, which I think you
22 said is fair market -- why did you write that?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 44

1 A Yeah. Well, that's, I mean, in looking at
2 fraud and abuse issues, it's frequently the starting
3 point. I mean, if something is not fair market value,
4 you're in trouble. It doesn't necessarily insulate
5 it, but it certainly is the first inquiry. If you
6 think about it as a -- in the terms of the kickback
7 world, if there is a transaction between two people
8 and it's fair market value, then one way to look at it
9 is there is no other excess value that could be the
10 kickback, that the exchange is the same. There is not
11 extra money that would be classified as a kickback.

12 Q And is fair market value also relevant to a
13 Stark Act inquiry?

14 A Yes. It's sort of -- it tends to be, when
15 you're looking at any kind of a compensation
16 relationship, it's the -- it's sort of the touchstone.
17 There are other requirements, but you sort of -- if
18 you don't have fair market value, you don't have to go
19 much -- I mean, that sort of knocks you out of the box
20 right away.

21 MR. MULHOLLAND: Just to remind you,
22 continuing objection to you asking Mr. McAnaney for

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 45

1 his opinions as an expert or otherwise still stands.

2 MR. ACKER: And let me give you an
3 instruction, Mr. McAnaney, that I only want to ask any
4 information that you had as of the time of your
5 representation, which was the summer of -- late spring
6 and summer of 2005. I'm not asking you to testify --
7 I would specifically ask you not to testify about any
8 information that you had after -- or any opinions that
9 you had after September 2nd, 2005, the date in which
10 you received -- or this letter was sent.

11 THE WITNESS: Okay.

12 MR. MULHOLLAND: And our objections are
13 still his opinions at that time as well.

14 MR. ACKER: We understand your continuing
15 objections.

16 MR. MULHOLLAND: Those are continuing.
17 Reiterate them again. I just wanted to make sure the
18 witness understood the nature of our objection.

19 MR. ACKER: Very good.

20 BY MR. ACKER:

21 Q Your question that you answered just a
22 moment ago about fair market value, did you have that

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 46

1 information at the time of your engagement in the
2 summer of 2005 about the importance of fair market
3 value?

4 A Well, yes.

5 Q Okay. I don't want to spend a lot of time
6 talking about the joint venture, but I will just draw
7 your attention so we can identify these documents. If
8 you look at page 006-19 through 006-42, and could you
9 tell me if this information all relates to the joint
10 venture or under arrangements deal that was discussed?

11 A Yes.

12 Q Let's get back to, then, page 43, another
13 handwritten document that's from page 006-43 to
14 006-44, two pages. Is this your handwriting again?

15 A Yes, it is.

16 Q And do you know when you wrote this?

17 A No. There is no date on it.

18 Q Okay. At the very top of page 43, what
19 does it say?

20 A It says, Tuomey notes TC, telephone
21 conference, Greg Smith -- G. Smith.

22 Q Okay. So does that help you with

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 47

1 understanding when this page at least was taken, when
2 these notes were taken?

3 A I mean, not -- not really.

4 Q So you don't know whether this was the
5 notes you took during that telephone conversation with
6 Greg Smith or not?

7 A I suspect it's -- I don't think it's the
8 first one. I mean, the only -- having those notes, it
9 might have been the second one, but it's -- I don't
10 think it is the first.

11 Q Okay. If you would, again, just read this
12 into the record so that we can make sure we understand
13 your handwriting.

14 A It says, Tuomey was going to do
15 ASC/urology. Tuomey converted to outpatient hospital
16 reimbursement rate. Urologists is the next line.

17 The next thing, first approach was compensation
18 contract. Under that, pay amount in excess of
19 collections.

20 Q Let me stop you there. What was your
21 understanding of the proposed part-time employment
22 agreement in relation to the relationship between the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 48

1 payment to the doctor and collections?

2 A Well, I mean, I had what he said, but
3 further on in the documents there is more methodology.
4 I mean, when you look at it, it appeared to be that.

5 Q Appeared to be what?

6 A Well, it -- well, the compensation seemed
7 to be -- well, I need to go back and look at the
8 documents.

9 Q Okay. We'll look at that later. What does
10 the rest of this say?

11 A Let's see. The next line is West Mart.
12 And then underneath that, lots of GPs. I think that's
13 probably general practitioners complaining of costs
14 and scheduling. And then under that, no commitment to
15 ASC.

16 Under that I think it says -- I actually can't
17 tell. I think the second word on that one might be
18 contemplating.

19 Q Is it possible the first word is while?

20 A Well, that's what I thought it was, while
21 contemplating.

22 Q Okay.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 49

1 A Yes. I think that's what it is. Under
2 that, evaluation of one group. I think under that,
3 GI.

4 Q What does GI stand for?

5 A Well, gastrointestinal.

6 Q Okay.

7 A A specialty, I believe. Under that,
8 confident of -- I think it's confident/of fair market
9 value or confident of market value. Under that, if
10 methodology is supportable.

11 Then under that is terms, ten years plus
12 three-year noncompete. Under that, competitive
13 service with hospital.

14 Q Okay. Next page?

15 A The next page, hesitated, Tuomey came back
16 with outpatient management contract to -- and that's
17 it. And then under that, will make to all staff. To
18 the side it says either/or. If invest in one. And
19 under that, employment -- I think that might be PT,
20 but I can't quite tell. And then --

21 Q Could it be AGT, agreement maybe?

22 A It could be.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 50

1 Q What was your understanding of that
2 either/or on the side?

3 A Well, as I -- my understanding was at least
4 at some point there was on the table this under
5 arrangements Outpatient Surgery Center investment and
6 also potentially an option for part-time employment,
7 but that physicians could only -- those physicians who
8 would be eligible for it could only do one or the
9 other.

10 Q Okay. What's it say next?

11 A Next line says, can't pay both.

12 Q Does that refer to what you were just
13 testifying, that they could choose one or the other
14 but they couldn't do both?

15 A Actually I seem -- I believe I recall that
16 this referred to -- I was told that Tuomey couldn't
17 pay both.

18 Q Tuomey couldn't pay what?

19 A Well, they had to choose because they only
20 had -- I mean, they couldn't afford to have everybody
21 do both. They couldn't --

22 Q Okay.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 51

1 A The next line is doctor -- I can't recall.

2 I can't read that.

3 Q Is it a name that starts with R?

4 A Yes, it is a name that starts with R.

5 Q Okay. Continue.

6 A If -- if -- it looks like if ED services
7 call pay medical office park. The next line seems to
8 be, if doesn't -- I can't read the next word. And
9 then, again, I think it seems to say medical park.

10 Under that, developer has approached entering
11 into buy office building at, and then it's attractive
12 project.

13 Q Project?

14 A Oh, attractive profit. I'm sorry.
15 Attractive profit/and hire doctor's brother.

16 Q Why do you laugh when you read that?

17 A Well, it's just -- I thought it was
18 amusing.

19 Q Why?

20 A Well, just because, I mean, it's -- it gets
21 done in business. I mean, you know, it gets done in
22 business sometimes.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 52

1 Q Okay. What does it say next?

2 A I don't see the line all the way over.

3 Seems to be adopted or something. I mean, something

4 like adopted -- or adapted. And then under it, I

5 think is -- I think it says conflicts credentialing.

6 Dr. -- and I can't read the name -- it looks like it

7 begins with an M -- and then under it there is another

8 word I can't read. And it says, plus ASC/MRI.

9 Under that, all this pattern practice to -- I

10 think it might be to attend physician, but I can't --

11 I can't quite tell.

12 MR. ACKER: Okay. Maybe this would be a

13 good time to take a break for lunch.

14 (Proceedings recessed at 1:09 p.m.)

15 (Exhibit No. 3 marked for identification and

16 attached hereto.)

17 (Counsel agree to providing Bates-stamped

18 exhibits prior to scanning and attaching to

19 transcript.)

20 (In session at 2:07 p.m.)

21 BY MR. ACKER:

22 Q Mr. McAnaney, the next document in the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 53

1 stack of documents we're looking at, which is part of
2 Exhibit 1, is page number 006-45. Do you see that?

3 A Yes.

4 Q What is this document?

5 A It's a printout of an e-mail.

6 Q And from whom and to whom is it?

7 A It is from Greg Smith to me and it's dated
8 June 19th, 2005.

9 Q So this would have been shortly before your
10 conference call to discuss the part-time employment
11 agreements?

12 A Yes, I think that was the 22nd and the
13 23rd. Yes.

14 Q Okay. And part of this on this particular
15 exhibit is hard to read. Do you know what might have
16 caused that?

17 A Well, yeah. I use a highlighter. And so
18 it doesn't -- I tried to use one that's light enough,
19 but I guess I didn't.

20 Q Okay. So you think that was something you
21 highlighted. Why would you have highlighted it?

22 A I highlight a lot. Sometimes it's

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 54

1 important; sometimes it's not. I mean, I don't
2 really -- I can't read it.

3 Q All right. Let me have you take a look at
4 what's been marked as Deposition Exhibit 3. It is a
5 multi-page document. Can you identify what this stack
6 of documents is?

7 A Yes. These are documents when I -- in
8 preparation for this deposition, I went through my
9 file to compare it to what had been produced before,
10 and then I looked for additional documents. Most of
11 these were just e-mails that were stored on my
12 computer. And I particularly did this one, printed
13 out the original message of this, because I noticed I
14 couldn't read it when I was reviewing the document.

15 Q Okay. So --

16 A So it's in here somewhere.

17 Q Just to clarify, Deposition Exhibit 1 is a
18 stack of documents that you delivered to me and to
19 Special Agent Sue Kim and Mr. Mulholland and Kelly
20 Bagby when we met in your office on November 1st of
21 2006?

22 A Yes, that's correct.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 55

1 Q And Exhibit 3 are additional documents that
2 you produced in response to the subpoena that we
3 issued to you for this deposition?

4 A That is correct.

5 Q And it consists mainly of e-mails?

6 A Yes.

7 Q All right. Let me have you turn to what I
8 believe -- the pages aren't numbered, but if you'll
9 count the pages, I believe it's the eighth page of
10 Exhibit 3, and compare that, if you will, with page
11 number 006-45 of Exhibit 1. Can you tell me if that
12 is the same e-mail?

13 A Yes, it is.

14 Q If you would read this first paragraph out
15 loud. And, again, this is from Greg Smith, who
16 is Tuomey's attorney, to you in June --

17 A No, he's Palmetto's.

18 Q Excuse me. Right, I'm sorry, Palmetto's
19 attorney, to you dated June 19th.

20 A Yes.

21 Q Read the first paragraph.

22 A Okay. Hey, Kevin. I think I am one of the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 56

1 few attorneys in our firm NC offices that came to work
2 over the last few days. Most are at Pinehurst for the
3 U.S. Open. Did you ever hear from Tim regarding times
4 to discuss the Tuomey employment arrangement and JV
5 arrangement? As we have discussed, my primary concern
6 with the employment arrangement is that the
7 compensation methodology makes it a mathematically
8 certainty that the professional fees collected by the
9 hospital will be less than the salary and benefits
10 paid to the doctors. The hospital must lose money. I
11 spoke with Tim Cejka -- C-E-J-K-A, is the name --
12 appraisers last week and did not receive any comfort
13 to lessen my concerns. Tim justified the arrangement
14 as being commercially reasonable by arguing the
15 hospital does not lose money because it makes money on
16 the facility fees and ancillary revenues (CTs, MRIs,
17 PT, and lab work) related to the physicians referrals.
18 Tim asked me to summarize in writing my compensation
19 methodology and appraisal concerns and attached is the
20 resulting memorandum I sent Tim. (It was dictated
21 quickly, so excuse the roughness.)

22 Q Okay. Now, is the portion that is

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 57

1 highlighted on page 006-45 of Exhibit 1 the portion
2 that says, my -- on the fourth line down of the eighth
3 page of Exhibit 3, my primary concern with the
4 employment arrangement is that the compensation
5 methodology makes it a mathematical certainty that
6 the professional fees collected by the hospital will
7 be less than the salary and benefits paid to the
8 doctors --

9 A Yes.

10 Q -- why did you highlight that?

11 A Well, I think it's -- it was clearly one of
12 the -- I mean, a concern, so I just -- that was his
13 concern. I highlighted it. So just --

14 Q So you would make sure you looked at that
15 issue?

16 A Yeah.

17 Q Okay. Now, back to -- well, right after
18 that it says, the hospital must lose money. Did you
19 take a look at the documents to determine whether or
20 not that statement was true?

21 A Well, I'm not sure I took -- I mean, I
22 certainly have taken a look at the documents. I don't

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 58

1 think I trusted my math enough to say that it was a
2 mathematical certainty. I certainly review in here, I
3 think there is a report from the appraisal fair market
4 value company.

5 Q I believe they pronounce it Cejka.

6 A Okay.

7 Q It's a very unusual name.

8 A So I looked at that. I did not
9 necessarily -- I did not do computations to find out
10 if it was -- I mean, I just don't trust my math that
11 well. That's what evaluators are for.

12 Q Back to page 006-45, you also -- is that
13 your handwriting at the top?

14 A Yes.

15 Q What does that say?

16 A Well, I was trying to -- I think it says,
17 this is the lab. I can't quite -- I was trying to
18 figure out. It sort of looks like lab, but I'm not
19 sure that's what it is.

20 Q Okay. Do you know why you wrote that?

21 A Well, it comes off a portion of this that I
22 underlined that says, arguing the hospital does not

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 59

1 lose money because it makes money on the facility fees
2 and ancillary revenues (CTs, MRIs, PT and lab work)
3 related to the physicians referrals.

4 Q Do you know if, during the conversation
5 that you had with Tim Hewson and Greg Smith on June
6 22nd, did Greg Smith make this argument, that the
7 hospital does not lose money because it makes money on
8 the facility fees and ancillary revenues?

9 A I don't recall.

10 Q Okay. At the top when you said the
11 handwriting said, this is the lab, could that be KB
12 instead of lab?

13 A I mean, it could be, but I don't -- I don't
14 think so.

15 Q Okay.

16 A Because I --

17 Q Was there a KB earlier in something we
18 looked at?

19 A Yes. No, I use KB normally for kickback.

20 Q Okay.

21 A And, I mean, this could be, but when I look
22 at this, this doesn't seem to me anything I would have

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 60

1 said this is the kickback --

2 Q So --

3 A -- for.

4 Q Okay. So is this relating -- "this"

5 relating to the underlined portion --

6 A I believe so.

7 Q Okay. And Greg Smith was saying that Tim
8 Smith (sic) was arguing that the hospital makes money
9 in facility fees and, therefore --

10 A Right.

11 Q -- is reasonable to pay this compensation
12 to the doctors?

13 MR. MULHOLLAND: Objection. The document
14 speaks for itself and asking him what Greg Smith was
15 saying or intending to say would call for speculation.

16 MR. ACKER: Okay.

17 BY MR. ACKER:

18 Q What is this? What was your understanding
19 of what was being argued -- what Greg Smith said Tim
20 Hewson was arguing?

21 A Well, it's a fairly common --

22 MR. MULHOLLAND: Same objection.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 61

1 THE WITNESS: I mean, the argument is one
2 that recurs in hospital and physician employment, that
3 they can afford to overpay them or pay them more than
4 they would make in private practice because they will
5 make up for it with, whether it's labs or ancillary
6 revenues, or just from inpatient admissions. And
7 that's sort of a -- I mean, that's -- it's a standard
8 allegation in a lot of these suits where it's alleged
9 that a hospital pays physicians -- over compensates
10 physicians.

11 BY MR. ACKER:

12 Q And at the time, in June of 2005, what was
13 your understanding of the validity of that argument?

14 A Well, I know the Justice Department bought
15 into it. I mean, I know that they -- they liked that
16 argument. There have been a number of cases that had
17 been brought and settled, so --

18 Q Brought and settled.

19 A I mean, False Claims Act cases on those
20 kinds of hospital-physician relationships.

21 Q Okay. Where the hospitals had paid to
22 settle the case?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 62

1 A Yes.

2 Q Okay. If you would turn over to -- we're
3 going to continue looking at Exhibit 1 and we'll put
4 Exhibit 3 to the side for now. Page 006-47. Actually
5 let me refer you back to -- the last sentence that you
6 read in the first paragraph on page 006-45 says,
7 attached is the resulting memorandum I sent Tim. Do
8 you see that?

9 A Yes.

10 Q Is this document starting on page 47 that
11 memorandum?

12 A Yes.

13 Q Okay. Let me direct your attention to the
14 second paragraph of this memorandum that starts under
15 the heading, material compliance standard.

16 A Yes.

17 Q Could you just read that paragraph aloud?

18 A The employment agreement compensation
19 arrangement must provide for payments at fair market
20 value which cannot be determined in a manner that
21 takes into account (directly or indirectly) the value
22 or volume of referrals by the referring physician or

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 63

1 other business generated between the parties. The
2 employment agreement must also be commercially
3 reasonable if no referrals were made by the employee.

4 Q In June of 2005 was that an accurate
5 statement of your understanding of the law at the
6 time?

7 A Well, I don't have it in front of me, but
8 it seems to be a fairly accurate summary of the
9 employment exception under the physician's
10 self-referral law.

11 Q Okay. And in the next section, issues
12 raised by compensation methodology, there is a quote
13 in the fourth line that says, while good-faith
14 reliance on a proper valuation may be relevant to a
15 party's intent, it does not establish the ultimate
16 issue of the accuracy of the valuation figure itself,
17 end quote. There are numerous examples of the OIG and
18 judge's finding that financial arrangements supported
19 by an appraisal was not in fact commercially
20 reasonable or fair value.

21 Did I read that correctly?

22 A Yes.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 64

1 Q Now, over to the side, is that your
2 handwriting?

3 A Yes, it is.

4 Q What does it say?

5 A HCA and Tenant.

6 Q And then there is a solid line next to the
7 last couple of lines of that paragraph?

8 A Yes.

9 Q Did you write that, too?

10 A Yes.

11 Q Why did you write those?

12 A Well, I believe this is just sort of as I
13 was going through -- when they say numerous examples
14 of the OIG and judge's finding, I think those are
15 references to two cases, two settlements, I think,
16 that involved that kind of an allegation.

17 Q Okay. And --

18 A Basically that Justice had brought a case
19 that had been settled notwithstanding valuations or --

20 Q By you making that notation, what, if any,
21 significance were you drawing to that sentence?

22 A Well, just that I think it's -- I think

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 65

1 it's correct that a valuation is -- is definitive.

2 Q That is, a valuation letter from an
3 appraiser isn't definitive on the question of whether
4 or not the compensation is fair market value.

5 A That's correct. At least from the -- from
6 the position of insulating you from a False Claims Act
7 suit or allegation. I mean, that's --

8 Q Okay. And then the next sentence, at the
9 bottom of that page, 006-47, says, based on the Cejka
10 computations for Dr. Drakeford, \$287,829 cash
11 compensation would be paid on \$295,361 collections.
12 The hospital would also pay additional -- continuing
13 on to the next page -- additional benefits of medical
14 malpractice insurance, FICA, and billing and
15 collections services totaling \$72,469. The Cejka
16 PowerPoint presentation illustrates that \$360,298 in
17 total cash compensation and benefits compared to
18 \$295,361 in collections results in \$64,937 net gain to
19 physician and loss to hospital.

20 Did I read that correctly?

21 A Yes.

22 Q On page 006-47 at the very bottom there is

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 66

1 another solid line on the left and what appears to be
2 a star.

3 A Yes.

4 Q Is that your handwriting?

5 A Yes, it is.

6 Q Why did you put that notation?

7 A Well, again, I mean, these are the issues
8 that were being raised by Greg Smith. So I was just
9 sort of noting that that's one to be paid attention
10 to, I think, I mean --

11 Q Okay. On page 006-48 at the bottom there
12 is a paragraph (D) that has two solid lines beside it.
13 Why did -- is that your handwriting?

14 A Yes.

15 Q And why did you note that?

16 A Well, again, it seemed -- I mean --

17 Q What does that paragraph deal with? Start
18 off with that.

19 A The paragraph deals with -- apparently what
20 it recounts is that Cejka in a conversation between --
21 between -- with Tim, Greg and Cejka -- that one of
22 the -- that one of the explanations for the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 67

1 compensation was that hospitals often lose money on
2 physician compensation and they gave as an example the
3 recruitment of physicians. And then it goes on and
4 says the kickback -- Stark and kickback recognize that
5 they may pay physician expenses and pay above-market
6 compensation to ensure they have specialized
7 professionals necessary to provide services in the
8 community.

9 Q And so why did you make a notation of that?

10 A Well, just because that's -- this is one of
11 the counter-arguments to Greg's concern, just sort of
12 to note it.

13 Q Okay. And this document that we're looking
14 at is a memo from Greg Smith to Tim Hewson?

15 A Yes.

16 Q On the next page, 006-49, at the bottom of
17 the long paragraph (E), seven lines up from the
18 bottom, the sentence starting with "you indicated."

19 A Yes.

20 Q Let me read that. You indicated that
21 Tuomey actually doesn't lose -- and this is, again --
22 I'm sorry. I'm going to start that sentence over.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 68

1 But this is from Greg Smith to Tim Hewson --

2 A Yes.

3 Q -- saying you indicated that Tuomey
4 actually doesn't lose money on its physician part-time
5 employment arrangements and that the arrangements are
6 commercially reasonable because Tuomey makes its money
7 on its facility charges and ancillary services, e.g.,
8 lab work, CTs, MRIs, etcetera, related to the
9 physicians referrals. The compensation to the
10 physicians must be commercially reasonable without
11 taking into account the value of the physician
12 referrals or other business generated between the
13 parties.

14 Now, that first sentence that I read where Greg
15 Smith is saying to Tim Hewson, you indicated that
16 Tuomey doesn't actually lose money because of the
17 reasons given, in any of your conversations with Tim
18 Hewson, did he deny that he had said that to Greg
19 Smith?

20 MR. MULHOLLAND: Objection to the form of
21 the question.

22 THE WITNESS: I don't recall, but I also

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 69

1 don't -- I mean, I don't recall one way or another. I
2 don't recall him actually saying that in any
3 conversation.

4 BY MR. ACKER:

5 Q Nor do you recall Tim Hewson denying that.

6 A Right.

7 MR. MULHOLLAND: Objection to form.

8 BY MR. ACKER:

9 Q Let's move on to page 006-52. And there
10 are pages from page 52 to page 56 that are handwritten
11 notes. Is all that on all those pages your
12 handwriting?

13 A Yes.

14 Q And if you'll look at the bottom of page
15 55, there is something that appears to be maybe in a
16 different pen. Is that still your handwriting?

17 A Yes.

18 Q Okay. Well, if I could, again, just ask
19 you to read, to the extent that you can, read this
20 into the record.

21 A Okay.

22 Q Starting with page 52.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 70

1 A Okay. Page 52 says at the top, it's got
2 Palmetto underscored, and then it has the number 1
3 next to compensation, number 2 next, and then
4 investments.

5 Q Now, let me just ask you the significance
6 of that number 1 and number 2.

7 A Well, I -- I assume it's referring to there
8 were two possible arrangements that were being
9 discussed. One was compensation and employment
10 contract and one was the investment in the under
11 arrangements, Newco.

12 Q So this would be the same, the compensation
13 would be the part-time employment?

14 A Yes.

15 Q And the investments would be the under
16 arrangements or joint venture Newco deal?

17 A Yes.

18 Q All right. Continue reading.

19 A Okay. The first note is, some other
20 employment agreements to part-time. Draft opinion.
21 Hospital due diligence. And then underneath that,
22 Kusserow, other materials. Then under that, initially

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 71

1 to assess two proposals, talk through issues and what
2 gives comfort. And am I -- I think comfortable, but
3 it's -- that's -- that's what I think it meant.

4 Q Okay.

5 A Under that, ultimately my evaluation as to
6 the level of compliance risk with the arrangements,
7 especially the anti-kickback statute issue. And then,
8 if we can fix. I think that's a reference to possible
9 fixes if there were problems. And then give -- given
10 structure of deal, business considerations, valuation,
11 next to it, 100% something. And then what done and
12 could do to manage risk.

13 Q The next page?

14 A At the top it says, is it defensible. And
15 then over on the side it says, 30 minutes, which makes
16 me think this is a -- makes me think these are notes
17 of a call and that was actually writing my time.

18 In terms of, quote, under arrangement, term
19 sheet and pro formas, underneath that, management
20 contract. Underneath that, understanding scope of --
21 I'm not sure what the last word is there.

22 Q Okay.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 72

1 A Underneath that, client -- joint
2 representation Tuomey, Palmetto Orthopaedic, both.
3 Fees split. Attorney-client privilege. No waiver
4 unless all consent. Disclaimer -- no -- disclosure
5 can share unless says no sharing. And then underneath
6 that, compliance issues, hospital, fees, letter of
7 representation oral. And then I'm not quite sure what
8 it was. And then 20/40 hours.

9 Q Okay. Next page.

10 A Begins at the top, says, government does
11 not like these. Not what -- I'm not quite sure what
12 it says there. Not what -- I think it's probably
13 Stark. I can't see what -- oh, Stark -- not what
14 Stark intended. But then it says, arrangement is very
15 aggressive especially given the factual background.
16 Can't be ignored because it would -- will be the
17 background to anything. Obvious issues under AKS. No
18 safe harbor, no ASC. Even Stark, and then in
19 parentheses, something seen as an end run, parens.
20 And then under it, one selectively offered so it takes
21 into account referrals. Other switch in regs. to
22 eliminate -- it looks like this type of something.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 73

1 Q And then there is one note that's circled
2 on the left-hand side about halfway up?

3 A Oh. Yeah, I'm sorry. It's circled and
4 says, low risk/high reward.

5 Q Do you know what you meant by that?

6 A No, actually -- I mean, I -- no.

7 Q What did you mean by the first sentence
8 there, government does not like these, not what Stark
9 intended? And is that an exclamation point after
10 that?

11 A Yes. Well, I think -- I mean, this -- I
12 believe this seems to me to be referring to the under
13 arrangements proposal. So I think what it says is,
14 not what Stark intended is, in fact, I think these
15 things can be structured to fit in the Stark, I mean
16 to comply with Stark, but so they don't -- I mean, the
17 fact is, even though they can't get it under that, I
18 think that they don't like them is sort of the point
19 and it's not really the intent.

20 Q Now, you say here, especially given the
21 factual background. What was the factual background
22 that you were referring to?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 74

1 A I think the factual background here was the
2 background, as I understood it, as to there had been
3 some kind of a -- an ASC proposal and a competing ASC,
4 and -- I can't quite recall now, but it seemed to be
5 that a lot of this was in response to a free-standing
6 ASC that had been built in the area and that was now
7 expanding to include other specialties. I believe it
8 had been a urology owned, if I recall, and that that
9 was now expanding and that this was basically -- so it
10 would be seen in that background, that that was
11 what -- it gave context to sort of what -- why the
12 offers were being made, etcetera.

13 Q Explain the significance of that. When you
14 say it would be seen in that context, who would see it
15 in that context?

16 MR. MULHOLLAND: Objection to the form.

17 THE WITNESS: The government, if it came up.
18 I mean, it would be again the context of the response
19 to sort of a competitive threat that referrals might
20 go there that they could purchase over there and that
21 this was a way to offer them something.

22 BY MR. ACKER:

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 75

1 Q Offer them something --

2 A Instead of going to the ASC.

3 Q And what, if anything, would the hospital
4 get in exchange for offering them this?

5 MR. MULHOLLAND: Objection to the form.

6 THE WITNESS: Admissions.

7 BY MR. ACKER:

8 Q Admissions -- business referrals?

9 A Yeah. Yeah.

10 MR. MULHOLLAND: Objection to form.

11 BY MR. ACKER:

12 Q Okay. If you go to the next page, 006-55.

13 A Yes.

14 Q Can you read the top?

15 A Yeah. It's number 2 in a circle.

16 Obviously I can't -- well, it says, I can -- I think
17 it meant I can't opine on fair market value of
18 service. I put in -- and then it says below that, I
19 note that the pro forma is a, quote, compilation,
20 which means nothing but management views.

21 Over to the left of that I've circled FMV
22 inside with -- underscored.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 76

1 Q Which means?

2 A Fair market value. And then underneath the
3 compilation, I say, but it's something ironclad,
4 underscored. And I can't -- right now I'm having
5 difficulty reading what it is. Okay.

6 And then there is the number 3. And it says,
7 several -- several -- it looks like several groups --
8 group out. Underneath that, buyouts without goodwill.
9 Under that, participation requirements -- oh, it says
10 several jump out. Is that --

11 Q Instead of "several group out," it says
12 "several jump out"?

13 A Yeah. Buyouts without goodwill.
14 Participation requirements. Not in my terms sheet but
15 in -- and I don't know what -- but it was in
16 something. And then 4, ongoing risk if docs. don't
17 actively participate.

18 Q And then at the bottom are some telephone
19 numbers.

20 A Yes. Those are --

21 Q Can you say the names of the people -- I'm
22 not interested in the numbers, but --

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 77

1 A Tellis, Tom Bullet, and Lisa Ohren.

2 Q And who are they?

3 A Well, Tellis is my dentist; Tom Bullet is a
4 lawyer; and Lisa Ohren is a -- actually I'm not sure
5 that's --

6 Q Let me just ask --

7 A -- Lisa Ohren because the phone number
8 doesn't seem right.

9 Q Do these notes have anything to do with
10 this case?

11 A No.

12 Q And the next page?

13 A I checked my voicemail.

14 Q The next page 006-56.

15 A Yes. It says, Greg Smith/Tim Hewson, Steve
16 Pratt.

17 Q Okay. Now, if you look at page 006-57, and
18 simultaneously look at 006-58, are these both letters
19 dated May 25th, 2005 via overnight delivery both from
20 Tim Hewson to you?

21 A May 12th.

22 Q I'm sorry. May 12th, 2005.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 78

1 A Yes.

2 Q And page 006-57 does not have an indication
3 that it was copied to anyone --

4 A That's correct.

5 Q -- other than you. And on the 006-58, it
6 shows that it was copied to Greg Smith with
7 enclosures.

8 A That's correct.

9 Q Look at page 57 and just read that. It's a
10 short letter.

11 A Dear Kevin. In connection with the
12 referenced review, I am enclosing two documents which
13 Tuomey Administration gave the board of trustees at
14 Tuomey Health System regarding part-time employment
15 agreements with the gastroenterologists. Please keep
16 this information confidential.

17 Q All right. That's all I need you to read.
18 Does that -- "please keep this information
19 confidential," what significance does that have to
20 you?

21 A Well, under the retainer, the agreement was
22 I could share any information provided me by one party

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 79

1 with the other party unless the party providing it
2 expressly said not to share.

3 Q Okay. And so in the one that he's asked
4 you to keep confidential, he didn't copy to Greg
5 Smith; on the other one he did.

6 A Yes.

7 Q And both of them are letters that say that
8 there are documents attached or enclosed?

9 A Yes.

10 Q And in the one that he did ask you to keep
11 confidential on page 57, he said it's two documents,
12 which Tuomey Administration gave the board of trustees
13 at Tuomey Health System regarding the part-time
14 employment agreements with gastroenterologists; is
15 that correct?

16 A That's correct.

17 Q What I want to do is try to identify which
18 pages following this go with which letters. And I
19 think I've figured it out, but I want you to confirm
20 whether this is correct or not.

21 If you will set aside for the moment pages 59
22 and 60, because I think that may be something else --

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 80

1 let's not lose them.

2 I'm looking for the two documents that Tuomey
3 Administration gave the board of trustees. If you
4 look at page 123 to 127 --

5 A Yes.

6 Q -- does that appear to be one of the
7 documents that was attached to the letter on page 57
8 that he asked you to keep confidential?

9 A Yes.

10 Q Okay. And if you'll look at pages 128
11 through 1 -- through the end, through 194 -- does that
12 appear to be the second document delivered to the
13 board of trustees with a number of attachments?

14 A Yes.

15 Q Okay. And just to kind of complete the
16 identification of the documents, in the letter on page
17 58 it says, enclosed please find copies of the
18 proposed part-time employment agreements with Drs.
19 Drakeford, Ford and Stroble in the referenced matter.
20 Also enclosed for your review is a copy of the Cejka
21 Consulting's August 31 presentation.

22 Does it appear that pages 61 -- well, on pages

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 81

1 61 through 72 there are Cejka opinion letters for the
2 three doctors mentioned -- Dr. Ford, Stroble and
3 Drakeford. Do you know if those were sent to you by
4 Tim Hewson? This would be pages 61 --

5 A Well, I am sure they were sent to me by Tim
6 Hewson. When, I'm not sure.

7 Q So it could have been part of this letter
8 or some other time, but pages 61 through 72, is it
9 correct those are the opinion letters from Cejka for
10 Drs. Ford, Stroble and Drakeford?

11 A Yes.

12 Q Okay. And you did receive those and you
13 did review those?

14 A Yes.

15 Q And if you'll look at pages 76 through 86,
16 is this the Cejka Consulting's August 31, 2004
17 presentation?

18 MR. MULHOLLAND: Objection to the form. If
19 you're asking him if it was a document referred to in
20 one of those letters, I think that's a different
21 question.

22 BY MR. ACKER:

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 82

1 Q Okay. Is this the document that Tim Hewson
2 referred to in his letter on page 58, which he
3 identified as a copy of Cejka Consulting's August 31,
4 2004 presentation?

5 A Yes.

6 MR. MULHOLLAND: I'll just object to the
7 extent your questions are asking him to actually
8 authenticate the underlying documents as opposed to
9 simply say whether he knows they were sent to him or
10 not.

11 BY MR. ACKER:

12 Q Right. This was, just to clarify, it's
13 your testimony that this presentation was the
14 documents sent to you with the letter on page 58.

15 A Yes.

16 Q And if you look at pages -- and I hope we
17 can keep these in order -- take as much time as you
18 need to keep them in order -- pages 87 through 122.

19 A Yes.

20 Q Are these the documents that Tim Hewson
21 identified in his letter on page 58 as the proposed
22 part-time employment arrangements with Drs. Drakeford,

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 83

1 Ford and Stroble?

2 A Yes, they are.

3 Q And those were sent to you by Tim Hewson?

4 A Yes.

5 Q And you reviewed them?

6 A Yes.

7 Q Okay. Let's go through these a little bit
8 more. In fact, why don't you put pages 59 and 60 back
9 in order. We're going to come back to them.

10 Let's turn to the document which we identified
11 as -- it's on page 006-76, which was the Cejka
12 Consulting presentation sent to you by Tim Hewson; is
13 that correct?

14 A Yes.

15 Q What was your understanding of who Cejka
16 was and -- of who Cejka was, Cejka Consulting?

17 A I think they were a consulting company that
18 had done the valuations for these part-time employment
19 compensation arrangements.

20 Q And what was your understanding of this
21 PowerPoint presentation or this presentation?

22 A Well, I'm not sure I had an understanding

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 84

1 besides what it says. I mean, I think it's a
2 presentation that they did that sort of laid out their
3 methodology and how they were reaching their
4 valuation --

5 Q Okay.

6 A -- or reviewing the proposal.

7 Q If you look on the second page of this
8 presentation -- and it's hard to read the numbers
9 because they are obliterated a little bit by the dark
10 black thing -- but it would be the second page of this
11 presentation, which is, in fact, page 77.

12 At the bottom, the very bottom, it says, on
13 average approximately 93% of a physician's outpatient
14 compensation is a result of incentives.

15 What was your understanding of that statement
16 in Cejka's presentation?

17 A Well, I just understood it to be what it
18 says, which is that there was probably a base
19 component and then -- but it was expected that 93% of
20 it would be -- would come in incentive payments.

21 Q What is it an incentive for?

22 MR. MULHOLLAND: Objection, calls for

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 85

1 speculation.

2 BY MR. ACKER:

3 Q To the extent you understand, what was your
4 understanding of what those incentives were for?

5 A Well, it says productivity incentives.

6 Q And what does a productivity incentive mean
7 or what was your understanding of productivity
8 incentive?

9 A Well, they are pretty common, physician
10 compensation. They can do -- I mean, every physician
11 service can have RVU units and you figure out how many
12 RVUs someone performs in a year and there are surveys
13 that sort of give you -- I mean, some convert it to
14 salary; some convert it to RVU units. So it's a
15 fairly standard method of incentivizing physicians for
16 their physician performance.

17 Q Okay. And in this particular proposed
18 arrangement, was it based on RVU or something else?

19 A I would need to --

20 Q Look on the next page.

21 A It says productivity incentives is 80% of
22 personal net collections.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 86

1 Q Okay. So this page talks about three
2 components of total compensation. Describe to us what
3 your understanding was at the time of how this
4 compensation arrangement would work.

5 A Well, I really have to go back -- as I
6 recall, it was fairly complicated. The idea was there
7 was a base salary and then there is productivity
8 incentive. Here it appears to be on personal net
9 collections. I mean, that's another way people do it.
10 If it's a physician service, you -- it's pretty common
11 in physician practices that you base it based on some
12 percent of collections and supposed to basically
13 represent some part of your profit after you take off
14 all your overhead and the cost of producing.

15 Q Okay.

16 A And then they have a quality incentive
17 here, which I'm not exactly sure since it goes off
18 personal productivity. But frequently you have
19 quality incentives and programs for patient
20 satisfaction and the quality of your work.

21 Q You said that it's fairly common to have
22 some portion of compensation based on productivity.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 87

1 Was there something unusual about this contract in
2 that respect?

3 MR. MULHOLLAND: Objection to form.

4 BY MR. ACKER:

5 Q What, if anything, was unusual about this
6 proposed compensation arrangement in respect to the
7 issue of productivity bonus?

8 MR. MULHOLLAND: Same objection.

9 THE WITNESS: I mean, I would say to me it
10 was unusual just because of the nature of sort of a
11 part-time arrangement I hadn't actually seen before.

12 BY MR. ACKER:

13 Q Okay.

14 A But aside from that, there are lots of ways
15 to structure compensation arrangements.

16 Q Okay. On the next page it says, in
17 addition to total compensation, Tuomey is also
18 providing these additional benefits. 100% malpractice
19 insurance coverage.

20 At the time you were engaged by Tuomey and
21 Palmetto, had you seen other part-time agreements that
22 paid 100% of malpractice insurance coverage?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 88

1 A I don't recall, but I haven't reviewed a
2 whole lot. I mean, I'm not -- I don't review the
3 physician compensation arrangements regularly.

4 Q Okay. Also on this page it says 100%
5 coverage for billing and collecting costs. Were you
6 aware of any additional contracts between Tuomey and
7 the physicians' group practice for billing and
8 collecting?

9 A I have no present recollection.

10 Q Okay. All right. Let me go to the next
11 page, then. The second bullet point on this page
12 says, on average, each physician receives a net gain,
13 excluding health insurance benefit, of 31% over
14 individual outpatient collections.

15 What was your understanding of that statement?

16 A Well, as I understood it, it means he's
17 receiving 31% more than he's collecting.

18 Q And --

19 A I mean, his total compensation package was
20 worth 31% more than what they were collecting for the
21 services being provided.

22 Q What, if any, questions did that raise in

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 89

1 your mind?

2 MR. MULHOLLAND: Objection.

3 THE WITNESS: It certainly raised questions
4 as to the commercial reasonability of the arrangement.

5 BY MR. ACKER:

6 Q Okay. On the next page you mentioned a
7 complex formula. Is this part of what you were
8 talking about?

9 A Yes.

10 Q This page is for Dr. Drakeford; is that
11 correct?

12 A Yes.

13 Q It's a little bit hard on this copy to read
14 the columns, but let's try to go through it.

15 At the very top does it say, plan payouts using
16 2003 collections data?

17 A Yes.

18 Q All right. And the first column is
19 Dr. Drakeford. The second column, does that say
20 annual outpatient net collections --

21 A Yes.

22 Q -- \$295,361?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 90

1 A Yes.

2 Q And then there is a series of computations
3 dealing with base pay, productivity incentive, quality
4 incentive, total cash compensation, liability
5 coverage. Do you see that coverage, liability
6 coverage?

7 A Yes.

8 Q And then there is a column, billing and
9 collection, 10% of the collections, \$29,536. Does
10 that refresh your recollection about whether or not
11 the hospital was going to pay a fee to the doctors or
12 the doctors' group practice for actually performing
13 the collections functions?

14 MR. MULHOLLAND: Objection to the form.
15 Also assumes facts that are not in the record.

16 THE WITNESS: Not particularly.

17 BY MR. ACKER:

18 Q Okay. Let's concentrate on the next to the
19 last column that says, total benefit except health
20 insurance, \$360,298, and then there is a block below
21 that that says total compensation plus additional
22 benefits excluding health insurance.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 91

1 Comparing that to the first or actually the
2 second column, the first financial column that says,
3 \$295,361 of annual outpatient net collections, what,
4 if anything, strikes you about those two numbers?

5 MR. MULHOLLAND: Objection to the form.

6 THE WITNESS: Well, what strikes one is that
7 he -- he's getting compensation and it appears it's
8 substantially above the amount he's even collecting.
9 So --

10 BY MR. ACKER:

11 Q And the last column, does that give a
12 dollar amount of the difference between those two
13 numbers?

14 A Yes.

15 Q And what's that dollar amount?

16 A \$64,937.

17 Q And, again, did that -- what, if
18 anything -- what, if any, concerns did you have based
19 on that net gain above collections?

20 MR. MULHOLLAND: Objection to the form.

21 THE WITNESS: Well, my concern was that
22 it -- going back to the -- some of the prior cases, I

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 92

1 was familiar with, I mean, it seemed payments in
2 excess of what someone makes would raise concerns to
3 the government. I mean, I think that that's --

4 BY MR. ACKER:

5 Q And if --

6 A That was my concern.

7 Q If you look at the next two pages, is the
8 next page for Dr. Ford?

9 A Yes.

10 Q And does it have a positive number for net
11 gain above collections?

12 A Yes.

13 Q Would the same concerns apply here to
14 Dr. Ford as to Dr. Drakeford?

15 A Yes.

16 Q If you look at the next page --

17 A And --

18 Q Yes. Go ahead.

19 A Another thing that was troubling was --
20 and, again, this was only a partial part of their
21 practice -- but even the net collection number -- I
22 mean, typically, collections, I mean, it wasn't clear

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 93

1 that the net -- well, it wasn't clear what that number
2 was and whether that would have included billing and
3 liability if you were in private practice, which would
4 be subtracted from that number.

5 Now, I assumed it was net, but it wasn't clear,
6 I mean, from this document.

7 MR. MULHOLLAND: Move to strike as not
8 responsive to any question on the record.

9 BY MR. ACKER:

10 Q Let me make sure I understand what you just
11 said. Normally a doctor would get his total
12 collections and he would have to subtract from that --
13 he would have to pay out of what he collected his
14 malpractice insurance and his FICA --

15 A Yes.

16 Q -- and other office expenses --

17 A Yes.

18 MR. MULHOLLAND: Object.

19 BY MR. ACKER:

20 Q He would have to pay somebody to --

21 MR. MULHOLLAND: I'm sorry. Objection to
22 the form.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 94

1 BY MR. ACKER:

2 Q He would have to pay somebody to collect --
3 some billing person in his office?

4 A Yes. And it may be that's what they meant
5 by net collections. Typically I think of net
6 collections as meaning what you get after contractual
7 discounts and no-pays and things like that. I mean,
8 what sort of cash coming in.

9 Q Okay. But normally somebody would have --
10 a doctor would have -- just want to make sure I
11 understand what you said a minute ago. A doctor would
12 have to take out of his collections his malpractice
13 insurance and other costs.

14 MR. MULHOLLAND: Objection to form. Also
15 calls for speculation.

16 BY MR. ACKER:

17 Q That was your understanding at the time?

18 A Yes, that's how --

19 Q And that raised additional concerns to you
20 at the time?

21 A Well --

22 MR. MULHOLLAND: Objection to the form.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 95

1 THE WITNESS: It just underscored my concern
2 that that number was -- was -- that number was of
3 concern, the difference at the end.

4 BY MR. ACKER:

5 Q Okay. And on the next page, this is for
6 Dr. Stroble, is that correct, the next page?

7 A Yes.

8 Q And, again, it had a net gain above
9 collections more than \$40,000?

10 A Yes.

11 Q The next page is for Dr. Tate. Do you know
12 who Dr. Tate is?

13 A No.

14 Q Okay. If you'll turn to the document that
15 starts on page 006-87, it's after the Cejka Consulting
16 documents. Is this the proposed physician employment
17 agreement for Dr. Drakeford?

18 MR. MULHOLLAND: Objection, calls for
19 speculation.

20 BY MR. ACKER:

21 Q Look at the bottom left corner.

22 A Oh, yes. Okay. Yes.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 96

1 Q And is this the document that was sent to
2 you by Tim Hewson --

3 A Yes.

4 Q -- that he represented to you was the
5 proposed part-time employment arrangement with
6 Dr. Drakeford?

7 A Yes.

8 Q If you'll turn to page 93, which is a later
9 page of this same document, do you see in the bottom
10 left-hand corner it says, page 7 of 18 of the Michael
11 K. Drakeford, M.D. physician employment agreement?

12 A Yes.

13 Q If you could read the top paragraph, it's
14 paragraph number 6.

15 A It says, exclusivity, the parties
16 acknowledge that the physician shall perform
17 exclusively for the practice all surgical procedures
18 other than inpatient surgical procedures and those
19 listed on Exhibit O at the practice.

20 Q Is that your handwriting?

21 A Yes, it is.

22 Q What does that say?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 97

1 A Well, I have a mark on the side in the
2 margin on the right-hand side. And I have a circle
3 around where it says, Exhibit C at the practice, and
4 then I have another circle with the word "what."

5 Q What's the significance of your handwritten
6 comments there?

7 A Well, I was probably just -- I believe I
8 was just making notes to myself to say what's in
9 Exhibit C.

10 Q Okay. If you'll look at 006-100, and does
11 that appear to be Exhibit A to this proposed
12 agreement?

13 A Yes.

14 Q And if you'll look at page 102, does that
15 appear to be Exhibit B to this agreement?

16 A Yes.

17 Q And if you'll look at page number 104, does
18 that appear to be Exhibit C?

19 A Yes.

20 Q And it says, Surgical Procedures Excepted
21 from the Exclusivity Provisions Set Forth in Section
22 6. Is there anything of substance in Exhibit C?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 98

1 MR. MULHOLLAND: Objection to the form.

2 THE WITNESS: No, besides -- other than the
3 title and Dr. Drakeford's name down in the corner, it
4 appears to be blank.

5 BY MR. ACKER:

6 Q So going back to page 93, 006-93, the
7 exclusivity provision that you read, what was your
8 understanding of that provision?

9 MR. MULHOLLAND: Objection.

10 THE WITNESS: Well, what I understand, the
11 provision appears to require him to perform all
12 outpatient surgical procedures -- and I forget, I have
13 to go back -- but I think at the practice. And I
14 think the practice is at the hospital outpatient
15 center, but --

16 BY MR. ACKER:

17 Q And what, if any, concerns did that
18 provision raise in your mind?

19 A Well, I mean, I think it's -- I mean, it
20 clearly required him to perform all procedures there,
21 and so it's -- it's worth noting. I mean, it's --
22 there are employment -- I mean, the Stark Law allows

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 99

1 you in certain cases to mandate -- although it
2 usually -- I mean, it has exceptions in the Stark Law
3 that you have to provide for the patient's insurance,
4 patient's coverage, things like that. So it's just
5 clearly you want to know.

6 Q Okay. If you'll turn to page 182 and look
7 at pages 182 through 193.

8 A Yes.

9 Q Can you identify that document?

10 A Yes. This appears to be an attachment that
11 was a letter from Strategic Management Systems, Inc.,
12 which was Dick Kusserow's consulting firm.

13 Q Is Dick Kusserow a lawyer?

14 A No. Actually I don't know. I don't
15 believe so.

16 Q Okay. If you look on page 006-184, it's
17 the second page of the letter, if you'll notice in the
18 fourth line from the bottom of the top paragraph, in
19 the middle of that line, it says, and, as you know --
20 do you see that?

21 A Yes.

22 Q And, as you know, we are not in a position

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 100

1 to render legal opinions on these laws; is that
2 correct?

3 A Yes, that's correct.

4 Q And this document was given to you before
5 you had the conversation on June 22nd?

6 A Yes.

7 Q And you reviewed it?

8 A Yes.

9 Q So was it your understanding that this
10 letter was a legal opinion?

11 MR. MULHOLLAND: Objection.

12 THE WITNESS: No.

13 BY MR. ACKER:

14 Q It was your understanding this was not a
15 legal opinion.

16 MR. MULHOLLAND: Objection.

17 THE WITNESS: Well, I didn't consider it a
18 legal opinion.

19 BY MR. ACKER:

20 Q Okay. And in fact he says, we're limited
21 to assisting you in reviewing these arrangements from
22 our previous positions in enforcement and regulatory

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 101

1 agencies; is that correct?

2 A Yes.

3 Q And if you look on page 006-184, that same
4 page, is he describing the same basic type of
5 compensation arrangement that you reviewed for
6 Dr. Drakeford?

7 A I'm not sure I can tell from this. I may
8 need to go back. I didn't --

9 Q Well, let's go back to the --

10 A Didn't look like -- the hundred thousand
11 annual salary appears higher than --

12 Q Okay. But it includes an annual salary, a
13 productivity bonus of 80% of cash collections, and an
14 incentive bonus.

15 A Yes.

16 Q And if you look on page 006-185, the
17 first -- the paragraph that says, overview, could you
18 read that paragraph out loud?

19 A The Office of the Inspector General (OIG)
20 at the Department of Health and Human Services (DHHS)
21 has been focusing attention to these types of
22 arrangements due to enhanced opportunity for abuse in

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 102

1 this area. The OIG has noted that a number of, quote,
2 sham directorships and administrative service
3 contracts with physicians have been established in
4 order to circumvent the anti-kickback statute. The
5 concern of the OIG is that there may be a flow of
6 benefits in excess of the value of services provided,
7 which suggests disguised kickbacks for referrals from
8 the physician or to ensure physician loyalty to the
9 hospital. The OIG has taken note that many referring
10 physicians were serving as medical directors,
11 advisors, or had contracts to perform administrative
12 services on behalf of the hospitals. In a number of
13 cases the OIG discovered referring physicians were
14 either paid well beyond the, quote, fair market value,
15 quote, of the services provided or they provided
16 minimal services relative to payments received.
17 Therefore, the OIG is critically reviewing the
18 activities of hospitals in this area.

19 Q What, if anything, did you at the time in
20 June of 2005 agree or disagree with that paragraph
21 that you just read?

22 MR. MULHOLLAND: Objection to the form. And

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 103

1 I'll just reiterate our prior objection about his
2 giving opinions.

3 BY MR. ACKER:

4 Q Just asking for your thoughts at the time
5 of your -- as of June of 2005.

6 MR. MULHOLLAND: Same objections.

7 THE WITNESS: I mean, I thought it was
8 reasonably accurate.

9 BY MR. ACKER:

10 Q Is there anything that you see in here that
11 you disagree with or that you disagreed with at the
12 time?

13 MR. MULHOLLAND: Same objections.

14 THE WITNESS: No.

15 BY MR. ACKER:

16 Q What, if anything -- what, if any, concerns
17 did you have in June of 2005 as to whether or not the
18 proposed contract with Dr. Drakeford would have been a
19 disguised kickback for referrals from the physician or
20 to ensure physician loyalty to the hospital?

21 MR. MULHOLLAND: Same objections.

22 THE WITNESS: Well, my concern with respect

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 104

1 to the kickback statute was -- primarily turned on
2 whether or not it would be considered a bona fide
3 employment arrangement.

4 BY MR. ACKER:

5 Q What about the Stark statute?

6 A Well, the Stark -- the Stark statute has
7 more stringent standards because it has to be fair
8 market value, you have to -- I don't have the
9 regulations -- but I believe the formulation is, to
10 the extent it has to be fair market value, not taking
11 into account the volume in value of referrals or other
12 business generated between the parties --

13 Q And what, if any --

14 A -- commercial, reasonable -- it has a
15 laundry list, but that's the main -- the two main
16 standards.

17 Q What, if any, concerns were raised in your
18 mind about those standards that you just raised as it
19 resulted -- as it related to the proposed employment
20 agreement with Dr. Drakeford?

21 MR. MULHOLLAND: Same objections.

22 THE WITNESS: Well, my concern was the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 105

1 numbers -- the mere fact that the physicians appeared
2 to be, based on Cejka, the total compensation seemed
3 to be significantly above their collections, that -- I
4 mean, that would be a red flag for enforcement, not
5 that it was necessarily -- ended the matter, but it
6 would -- if it came to their attention, it would jump
7 out at them.

8 BY MR. ACKER:

9 Q Tell me what you recall about the June 22nd
10 conference call between you, Tim Hewson, and Greg
11 Smith.

12 A I'm not sure I have a real recollection of
13 the call, exactly what it was. I mean, I think I
14 expressed those -- those concerns. My recollection is
15 that, A, I thought the employment -- to the extent you
16 could do an employment arrangement, I thought it was
17 the best. I thought, given what I had seen of the
18 context and things like that, that -- and these other
19 proposals, that I thought you wanted to be in the safe
20 harbor under the anti-kickback statute. Because if
21 you're in the safe harbor, intent doesn't matter,
22 you're safe. And so, therefore, I said -- I think we

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 106

1 discussed at some point I think that's the way to go
2 if you can possibly do it.

3 Q And under the kickback --

4 MR. LEWIS: Did he finish?

5 BY MR. ACKER:

6 Q Oh.

7 A And that was -- again, the only concern --
8 I mean, the concern with respect to that, I think, is
9 whether or not you have a bona fide employment
10 relationship.

11 Q Okay. And what did you all discuss about
12 that anti-kickback safe harbor?

13 A Well, I'm not sure -- I mean, I think, if
14 we would have discussed anything, it would be whether
15 this kind of arrangement would be a bona fide
16 employment, which, again, I think -- I was not an
17 employment lawyer. The test is IRS test. But,
18 clearly, if you fit in that, under the kickback
19 statute, my view is you're immunized.

20 Q What, if anything, did you discuss in that
21 June 22nd meeting concerning the Stark Law?

22 A The Stark Law has -- unlike the kickback

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 107

1 statute, which has no fair market value test, you can
2 pay them anything you want, there is some -- at least
3 the Inspector General, there is a letter out, which is
4 just a letter, but in which they have taken the
5 position that there is language in the kickback safe
6 harbor that says it has to be payment for -- I forget
7 exactly -- but they have taken the position that, for
8 example, you couldn't just hire a physician and pay
9 him for his referral. He's got to perform services or
10 something. I think you can read the statute and argue
11 with whether or not that's a correct interpretation,
12 if it's not broader.

13 Q Is what you're talking about --

14 MR. MULHOLLAND: Excuse me. He has more to
15 say.

16 MR. ACKER: Well, I wanted to clarify.

17 BY MR. ACKER:

18 Q You're talking about the kickback statute?

19 A Yes, that's the kickback statute.

20 Q My question to you was the Stark Law.

21 A The Stark Law, by contrast, you have to
22 have fair market value and it can't take into account

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 108

1 the value or volume of referrals.

2 So this is -- I mean, in employment, the Stark
3 Law's usually the one that you -- I mean, that's the
4 smaller wicket to get through.

5 Q What do you mean by "smaller wicket to get
6 through"?

7 A Well, typically the Stark exceptions are
8 broader and the anti -- to the extent there might be
9 an analog in the anti-kickback safe harbors, they are
10 much narrower. Employment is -- I mean, I think
11 it's -- it's certainly the biggest. There may be
12 another, but in employment it's exactly -- as I said,
13 the kickback safe harbor for employment is -- well,
14 kickback law, it's a statutory exception. It's not a
15 regulation. In the Stark Law, you have to fit in the
16 safe harbor.

17 Q And you discussed those issues during the
18 June 22nd meeting?

19 A Yes.

20 Q And what, if any, concerns did you raise
21 with Tuomey about the fair market value issue under
22 Stark?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 109

1 A Well, just -- I mean, basically looking at
2 those figures, it raised a red flag based on what -- I
3 mean, the cases that had been -- right at this time in
4 the immediate -- I would need to go back and look --
5 but there had been a series of cases that the
6 government was beginning to bring that we talked
7 about, fair market cases, which had settled on --
8 basically that was the crux of the government's case,
9 was the physicians were being employed -- physicians
10 previously in private practice in the communities were
11 being employed by the hospitals for amounts that were
12 substantially in excess of what they had been getting
13 in the private -- in their private practice, that they
14 were really being overcompensated. It wasn't fair
15 market value. That's basically it.

16 Q And so --

17 A And, in particular, one of the concerns
18 which I brought up was there had been a case right in
19 South Carolina.

20 Q What was that case?

21 A I thought you'd say that. I was afraid
22 you'd say that.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 110

1 MR. LEWIS: McLeod Hospital versus --

2 THE WITNESS: McLeod. It was called McLeod,
3 I think. Is there a McLeod Hospital System?

4 BY MR. ACKER:

5 Q And did you discuss that case during the
6 conversation?

7 A Yes. Yes.

8 Q And what did you say about the comparison
9 to this case to McLeod?

10 A Well, I said -- I mean, I said it was
11 basically the same kind of allegations, as I
12 understand it. So my point was, from a risk matter,
13 it was not a kind of case that was unfamiliar to the
14 U.S. Attorney in South Carolina.

15 Q And you mentioned risk. What level of
16 risk, if any, did you see in this arrangement?

17 MR. MULHOLLAND: Objection.

18 BY MR. ACKER:

19 Q Or what -- let me change the question.
20 What level of risk did you communicate to Tim Hewson
21 in that meeting?

22 MR. MULHOLLAND: Objection.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 111

1 THE WITNESS: I communicated I thought that
2 this had a substantial risk.

3 BY MR. ACKER:

4 Q Do you recall any -- do you recall using
5 the term that this would set off bells and whistles?

6 MR. MULHOLLAND: Objection.

7 THE WITNESS: I don't recall it
8 specifically, but it's an expression I use.

9 BY MR. ACKER:

10 Q And when you use that expression, what do
11 you mean by it?

12 MR. MULHOLLAND: Objection.

13 THE WITNESS: Well, I just mean that, if it
14 came to -- I mean, if -- in my experience, if an OI
15 agent or if Justice -- if that came to their
16 attention, they would -- they would think of it as --
17 I mean, it would be a good case. It would be
18 something they are familiar with, they have seen, they
19 know how to deal with, and they have gotten
20 settlements in the past.

21 BY MR. ACKER:

22 Q Do you recall if you used the term "red

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 112

1 flag" in that meeting?

2 A Well, again, that might very well. It's a
3 term I use, the same.

4 Q What does that mean?

5 A Well, it's the same thing, bells and
6 whistles. It's --

7 Q Do you recall whether you told Tim Hewson
8 that this would be a relatively straightforward case
9 for the government to prosecute?

10 A Well, I think I said, from their
11 standpoint, the allegations would be very
12 straightforward. Basically the same as what I had
13 understood had been in the Tuomey and these other
14 cases, which was simply they were being paid above
15 fair market value.

16 Q Could you repeat the last part of your
17 answer?

18 (Record read.)

19 BY MR. ACKER:

20 Q When you said Tuomey --

21 A I meant McLeod.

22 Q You meant McLeod. Thank you. In other

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 113

1 words, this was similar to the McLeod case.

2 MR. MULHOLLAND: Objection.

3 THE WITNESS: Well, to the government's eyes

4 it would be -- or at least, if they saw this at first

5 glance, that's what they would think.

6 BY MR. ACKER:

7 Q Do you recall whether you said during that

8 meeting to Tim Hewson that the key to fair market

9 value was what the doctors were making before?

10 A Well, I'm not sure I said "the key." I

11 think that the government's position -- they would

12 start with that, yes.

13 Q Do you recall saying that Exhibit 1 of the

14 government case would be the Cejka presentation?

15 A I think I recall that.

16 Q And what did you mean by that?

17 A Well, just those pages that we went through

18 where it had collections and then all the things and

19 then the figures and the net gain above collections.

20 I just --

21 Q Do you recall Tim Hewson asking you if the

22 hospital losing money was the test?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 114

1 MR. MULHOLLAND: Objection.

2 THE WITNESS: I don't recall that.

3 BY MR. ACKER:

4 Q Okay. Do you recall saying that the test
5 for fair market value was what another employer would
6 pay, not a hospital -- not how much a hospital getting
7 referrals would pay?

8 A I do not recall saying that exactly, but --

9 Q What do you recall --

10 A But I may have -- I think that is a
11 benchmark. It is certainly not the test. Fair market
12 value is -- the government's acknowledged again and
13 again -- is a range and there is a range of values,
14 but one of the benchmarks I have always used and I
15 think that is what -- what another physician would pay
16 for that practice so that -- he's someone who is not
17 in a position -- who is in a position to benefit from
18 that practice as a physician practice but not -- not
19 with the inpatient revenue that they might generate.
20 So I've always thought that -- I mean, that's sort of
21 a -- it strikes me that fair market value is what
22 someone else would pay in the market. And the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 115

1 hospital can pay that.

2 BY MR. ACKER:

3 Q When you say you've always used that, that
4 included the time during June of 2005?

5 A Yes.

6 MR. MULHOLLAND: Objection.

7 BY MR. ACKER:

8 Q And why -- why does it make a difference
9 what another physician would pay as opposed to what
10 the hospital might pay?

11 MR. MULHOLLAND: Objection.

12 THE WITNESS: Well, I mean, my view is it's
13 a relatively straightforward test of that is what
14 someone who is basically paying for the physician's
15 practice -- for his services and the value of that
16 practice as a practice without generating -- that's --
17 that's contrary to the OIG position as laid out in the
18 letter I referred to before -- it's a Mac Thornton
19 letter to the IRS -- is that a hospital can't even do
20 that because to the extent a physician -- another
21 physician might pay for a physician and get ancillary
22 services or something, that the official OIG position

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 116

1 is they can't even pay that, they have to back that
2 out, which, I think, is a silly position and doesn't
3 make sense particularly.

4 BY MR. ACKER:

5 Q What is different between what a hospital
6 might be willing to pay and what a physician might be
7 willing to pay for the services from a doctor?

8 MR. MULHOLLAND: Objection to the form.

9 THE WITNESS: Well, in the government fraud
10 and abuse world, it's because that a hospital, to the
11 extent they can capture inpatient business, ancillary
12 services, they can actually -- I mean, they can make a
13 lot more money off a physician. So they could afford
14 to pay him more than he would make in private practice
15 in some cases and still have a substantial profit off
16 the other services generated. I mean, physicians are
17 gatekeepers to the healthcare system and they make
18 decisions as to where patients go, what services that
19 they get, many of which they actually don't provide
20 themselves. I mean, that's the -- that's sort of the
21 basis of the -- of the kickbacks. I mean -- not of
22 the kickbacks, but one of the main concerns is that

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 117

1 they be paid to influence those decisions, so --

2 Q So the hospital might get referrals from
3 the physician and they might be willing to pay, is
4 that --

5 MR. MULHOLLAND: Objection.

6 THE WITNESS: Yes.

7 MR. MULHOLLAND: Objection.

8 THE WITNESS: They would make revenue --
9 they would make revenue from inpatient admissions,
10 outpatient testing that's -- I mean, that basically
11 generates substantially more revenue than physician
12 services, physician fees.

13 BY MR. ACKER:

14 Q Do you recall in that meeting discussions
15 about why the physicians were not allowed to do both
16 the joint venture under arrangements deal and the
17 part-time employment agreement?

18 MR. MULHOLLAND: Objection to form of the
19 question.

20 THE WITNESS: I don't recall specific
21 discussion of that.

22 BY MR. ACKER:

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 118

1 Q Do you recall at any time Tim Hewson giving
2 you rationale as to why physicians couldn't do both?

3 MR. MULHOLLAND: Objection to the form of
4 the question.

5 THE WITNESS: No, I don't recall.

6 BY MR. ACKER:

7 Q Do you recall during that meeting telling
8 Tim Hewson that you thought the proposed employment
9 agreements were problematic?

10 A Again, I don't have a specific
11 recollection, but it's a phrase I use a lot.

12 Q And when you use that phrase or when you
13 used that phrase in 2005, what would you have meant by
14 that?

15 MR. MULHOLLAND: Objection.

16 THE WITNESS: That it would raise concerns,
17 that there were -- that I thought -- that they raise
18 several problems or potential problems would be
19 accurate.

20 BY MR. ACKER:

21 Q If you'll turn to page 006-73 of Deposition
22 Exhibit 1. Let me ask you to identify pages 73

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 119

1 through 75. It's three pages of handwritten

2 information?

3 A Yes.

4 Q And is it your handwriting?

5 A Yes.

6 Q If you could start reading on page 73 at

7 the top.

8 A It says, 1, fair market value is -- and
9 then it's got inserted, not going to be accepted by
10 government.

11 Q You had something else that looks like
12 you've crossed it out?

13 A Yeah. Simply not credible.

14 Q Is this something that you told Tim Hewson
15 during the meeting on June 22nd?

16 A I don't think I told him -- I believe these
17 are notes I made to myself in preparation for that
18 conference call.

19 Q Okay.

20 A And I think I crossed that out and I
21 probably said is not going to be accepted by the
22 government.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 120

1 Q So you did tell Tim Hewson that during your
2 meeting?

3 A I believe -- I believe so. I mean, that's
4 my practice.

5 Q Okay.

6 A Or, if not the exact words, something very
7 similar.

8 Q Do you recall why you crossed out "simply
9 not credible" and replaced it with "not going to be
10 accepted by government"?

11 MR. MULHOLLAND: Objection. I think it's
12 asked and answered.

13 THE WITNESS: I mean, I think it was -- I
14 think it was a misstatement. I decided on reflection
15 that wasn't right.

16 BY MR. ACKER:

17 Q Okay. If you could read the next portion.

18 A Paying docs. more than earned is red flag
19 and relatively easy -- I don't know if it's Stark --
20 and then I have next to it Northridge Tenant, and then
21 McLeod, names of cases.

22 Q And you've already mentioned McLeod. What

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 121

1 was your understanding of Northridge Tenant?

2 A Well, the Northridge case was -- was a
3 tenant-owned hospital in Florida, which they -- the
4 allegation was they had sort of bought this hospital
5 and then gone and employed a number of physicians from
6 the local community that were high refers and paid
7 them a lot of money, and they had just -- I can't
8 remember -- they settled the case for about -- for a
9 substantial sum of money. And I think Northridge was
10 the first case. And then McLeod came afterwards or
11 they came just about the same time.

12 Q And you discussed those cases with Tim
13 Hewson during your conference call on the 22nd of
14 June?

15 A Well, yes. At least I mentioned them.
16 Underneath that --

17 MR. MULHOLLAND: He was starting to respond.

18 MR. ACKER: I think he was going to continue
19 reading.

20 THE WITNESS: Yeah.

21 MR. ACKER: I wanted to ask him one more
22 question about that comment of paying docs. more

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 122

1 than --

2 BY MR. ACKER:

3 Q What did you say --

4 A More than they earn.

5 Q -- is red flag and relatively easy Stark.

6 You said something along those lines to Tim Hewson

7 during that meeting?

8 A I believe I did.

9 Q Okay. What's the next comment?

10 A It makes no sense unless taking account of
11 referrals and you can't do -- well, and can't do that.

12 Q What does that mean?

13 A Well, it goes back to the Stark -- the
14 Stark exception, which says you have to pay fair
15 market value, not taking into account the volume and
16 value of referrals or other business generated.

17 Q And when you say it makes no sense, what
18 are you referring to by it?

19 A I think it's paying docs. more than they
20 earn.

21 Q So paying docs. more than they earn makes
22 no sense unless they what?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 123

1 MR. MULHOLLAND: You're asking him what that
2 says as opposed to asking him to agree with the
3 statement?

4 MR. ACKER: I want him to --

5 THE WITNESS: Unless the payments take into
6 account the referrals.

7 BY MR. ACKER:

8 Q Okay. So was it your understanding that
9 this -- or was it your concern -- that this contract
10 would be viewed as paying for referrals?

11 MR. MULHOLLAND: Objection.

12 THE WITNESS: Well, my concern was that it
13 would be considered that the compensation was taking
14 into account referrals.

15 BY MR. ACKER:

16 Q Okay. And when you say "can't do that,"
17 what does that mean?

18 A Well, it's just the Stark -- I mean, you
19 can't do that and fit in the Stark exception.

20 Q Okay. If you'll read the next section.

21 A It says, AKS, which stands for
22 anti-kickback statute, very broad but government does

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 124

1 say -- and this is a quote -- for employment in the
2 furnishing of any item or service for which payment
3 may be made in whole or in part. And that does not
4 include referrals. That's a -- that's a reference to
5 the Mac Thornton letter that I spoke of earlier.

6 Q And when you read that, you said, or in
7 whole or in part, but that's not actually on this
8 document; is that correct?

9 A Oh. Oh, yeah. No, it's -- yeah, right.
10 Yes, that is not -- it stops at "payment may be made,"
11 quote, and does not include referrals.

12 Q And then it says --

13 A Oh, see Mac Thornton IRS letter.

14 Q Okay. And then what's the next, section 3?

15 A It says, Stark -- Stark very doubtful, I
16 think, and will throw in both. I think that's what --
17 yeah.

18 Q What did you mean by "Stark very doubtful"?

19 A Well, given -- given the first part, if
20 it's not fair market value, or it takes into account
21 the volume or values, then it will fail under Stark,
22 and in a False Claims Act they will throw the kickback

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 125

1 allegation in as well.

2 Q And when you say "very doubtful," did you
3 mean it would be very doubtful that this proposed
4 agreement would fit within a Stark exception?

5 A Well, I probably -- I'm -- I may have
6 said -- what I think is it certainly is questionable
7 if it's in Stark.

8 Q Okay.

9 A So --

10 Q And did you tell that to Tim Hewson during
11 this meeting?

12 A Yes. I -- yes.

13 Q Can you read --

14 A I mean, I didn't say it didn't. I just
15 said it certainly has a lot of flags about it that
16 they will question.

17 Q Can you read the next section?

18 A Very risky, underscored, and then I have
19 the next -- noncompete effectively precludes from
20 practicing because you can't -- if you can't perform
21 outpatient. And term, question mark, how reasonable.

22 And then under that, history.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 126

1 Q When you said "term, how reasonable," what
2 were you -- what was in your mind at the time you
3 wrote that?

4 A Well, the term of these employment
5 contracts were ten-year terms, and then I think it was
6 a three-year noncompete, which I, again, one of the
7 tests, I believe, under Stark -- I'd have to go
8 back -- is sort of commercially reasonable. And I
9 just -- it seemed like a long time for an employment
10 contract.

11 Q Okay. And when you say here "very risky,"
12 did you communicate that to Tim Hewson during the June
13 22nd meeting?

14 A That would have been my practice having
15 written this out.

16 Q Okay. If you'll turn to page 74 and read
17 what it says under No. 1 there.

18 A Employment fair market value does not pass
19 the red face test.

20 Q Let's stop there. What do you mean by the
21 "red face test"?

22 A Well, it's just -- it's hard to say with a

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 127

1 straight face. I mean, it just doesn't -- it

2 doesn't -- it's pretty hard to believe.

3 Q Hard to believe that the compensation
4 arrangement outlined for Dr. Drakeford, hard to say
5 that with a straight face that it meets fair market
6 value test?

7 A Well, a compensation arrangement that
8 appears to pay someone significantly above what they
9 are actually earning or revenue generating from their
10 fees for you. I mean, it's just hard to believe
11 anyone would employ someone for that, that's all.

12 Q Okay. Read No. 2.

13 A "Can't" seems to be crossed out -- pay
14 docs. more than -- oh, pay docs. more than they earn
15 raises huge red flags. McLeod was exactly about this.
16 They had fair market value opinion.

17 Q So under "huge red flags," what do you have
18 under those words?

19 A They are just underscored.

20 Q And why did you underscore those?

21 A Well, I just thought that -- I mean, I had
22 been asked to review what the compliance risks were.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 128

1 And, basically, given the fact that there were these
2 cases that the government was bringing on what seemed
3 to be pretty similar facts, that that was -- that was
4 a huge red flag. And, again, specifically McLeod,
5 because it was in the same state.

6 Q And when you say "they had fair market
7 value opinions," who is "they"?

8 A McLeod, was my understanding that they had
9 had --

10 Q And so what's the significance of that?

11 MR. MULHOLLAND: Objection.

12 THE WITNESS: Just having a valuation wasn't
13 necessarily going to -- wasn't going to protect the
14 arrangement necessarily.

15 BY MR. ACKER:

16 Q Okay. And this No. 1 where you say
17 employment doesn't -- FMV doesn't pass the red face
18 test, and, No. 2, about the huge red flags and McLeod
19 and that McLeod had fair market value opinions, did
20 you discuss all of that with Tim Hewson during the
21 June 22nd meeting?

22 A Well, I'm sure -- I mean, it's basically

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 129

1 the same -- I am not sure whether this may be a
2 further refinement of this.

3 Q Okay.

4 A I mean, they may have both been pre-meeting
5 talking points.

6 Q My question is, did you discuss those?

7 A Yes, the same -- yes.

8 Q Okay. Can you read No. 3?

9 A Can't justify with referrals of
10 ancillaries. That is what -- that is what Northridge
11 and Tenant and fair market value excludes
12 consideration of ancillary referrals.

13 Q What was the purpose for writing this No. 3
14 about can't justify with referral of ancillary?

15 A Well, I -- I mean, it was certainly, I
16 believe, it was in advance in case that came up
17 because of the -- what Greg Smith had sent in his
18 concerns. And so I was just prepared -- I mean,
19 prepared for that, if that came up, if that was the
20 justification.

21 Q And under the Stark Law, did you have
22 concerns that that would not be a valid justification?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 130

1 A Yes, under the Stark Law, I'm sure -- I
2 mean, it's -- let me clarify exactly.

3 I think you can actually take ancillary incomes
4 in a physician's -- I believe, to go back -- if you
5 were to employ physicians and say you were to employ
6 two cardiologists and cardiologists in private
7 practice get ancillary income, and so their earnings
8 the year before you employ them, their earnings take
9 into account that ancillary income, if you employ
10 them, you can pay them that amount. I think you can
11 take into account -- because that's fair market --
12 they are not -- two people, he's not going to come
13 work for you unless he makes at least what he's making
14 there. That, I think you can do, if you're setting an
15 employment rate.

16 Q Just to clarify --

17 MR. LEWIS: Let him finish.

18 BY MR. ACKER:

19 Q When you clarify ancillary --

20 A That's my view.

21 MR. LEWIS: Let him finish.

22 BY MR. ACKER:

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 131

1 Q When you clarify ancillary --

2 MR. LEWIS: Excuse me. Let him finish.

3 MR. ACKER: I'm asking him a question.

4 MR. LEWIS: No, sir. He didn't finish his
5 last one. You interrupted him. He was hurting you
6 and you interrupted him and I don't appreciate it.

7 MR. ACKER: He wasn't hurting me. I was
8 trying to clarify what he was saying.

9 MR. LEWIS: Let him finish.

10 BY MR. ACKER:

11 Q Did you finish?

12 A Yes, I finished.

13 Q When you say ancillary services by a
14 cardiologist, you're talking about the ancillary
15 services that would normally be provided in the
16 cardiologist's office.

17 A Yes. Yes.

18 MR. MULHOLLAND: Objection to the form.

19 THE WITNESS: Yes.

20 BY MR. ACKER:

21 Q And what's the distinction between that and
22 ancillary services at a hospital?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 132

1 MR. MULHOLLAND: Objection to the form.

2 THE WITNESS: Well, I think, for example --
3 well, to go to the Northridge case, the Northridge
4 case -- they actually, when they were in that case,
5 the documents that were produced where they were doing
6 the contract, the employment contract, and they
7 actually gave them this amount of money and then they
8 projected what his ancillary income -- the ancillaries
9 the hospital was going to make off of them. And so
10 that was then used as -- used in the calculation of
11 their employment. That -- that's -- that you cannot
12 do.

13 BY MR. ACKER:

14 Q Okay. If you could go to the next page,
15 page 006-75, and if you could read --

16 Well, do you know what this document was?

17 A I think, again, these are notes to myself
18 based upon -- I mean, during my review of the --
19 probably summarizing for myself.

20 Q Okay. If you could read No. 1.

21 A Consultant's chart shows bottom line. Next
22 sentence says, doctors make 31% more with the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 133

1 contract. Underneath it, but actually much greater
2 since 31% compares new package with old net revenues.
3 Many of new benefits are actually subtracted from -- I
4 can't read the last word. For example, benefits and
5 billing.

6 Then, 2 says, best idea of comparable in
7 addressing M.D.s is their prior income, not national
8 averages.

9 Q Let me ask you: Did you discuss these
10 issues that you have just read from No. 1 and No. 2 on
11 this sheet with Tim Hewson during the June 22nd
12 meeting?

13 A I can't recall if we discussed them all.

14 Q Okay. If you'll read No. 3.

15 A 3. Kusserow memo I.D.'d concerns with
16 productivity and incentives. I think that's what that
17 is.

18 And then, 4. For AKS terms, length of
19 contract, noncompete, and then background of ASC.

20 Q Okay. Thank you. Let me draw your
21 attention to Exhibit 3 again. And, again, this is the
22 set of documents that you brought in today responsive

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 134

1 to our subpoena; is that correct?

2 A Yes.

3 Q Consists mostly of e-mails?

4 A Yes.

5 Q You have to count these pages because they
6 are not numbered, but if you look at the fifth page of
7 the exhibit. And let me draw your attention -- well,
8 let me just identify the page. At the very top of the
9 page it says, from Kevin McAnaney sent Friday, May
10 12th, 2006, 11:51 a.m.

11 A Yes.

12 Q Look below that. Do you see another e-mail
13 from Dan Mulholland sent Friday, May 12th, 2006 at
14 11:36 a.m.?

15 A Yes.

16 Q So would it appear that this one at the
17 bottom is the first message and the one at the top is
18 a response to that?

19 A Yes.

20 Q This was after the termination of your
21 engagement with Tuomey and Palmetto; is that correct?

22 A Yes, that's correct.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 135

1 Q Mr. Mulholland, in the e-mail at the
2 bottom, requests to meet with you; is that right?

3 A Yes.

4 Q And then the e-mail at the top at 11:51
5 a.m., says, you have no objection to meeting with you
6 and Jim provided that I get a waiver from Palmetto
7 Orthopaedic Group. I was retained by both and
8 wouldn't want to get crosswise with either group.

9 A Yes.

10 Q Is that what that says?

11 A Yes.

12 Q Did you in fact meet with Mr. Mulholland as
13 a result of this e-mail?

14 A No.

15 Q Okay. You later met with Mr. Mulholland
16 and me and others in approximately November of 2006?

17 A Yes.

18 Q But you did not meet with Mr. Mulholland --
19 let me ask you this. Did you meet with any
20 representatives of Tuomey between the time your
21 engagement was terminated in September of 2005 and
22 when you met with me and Mr. Mulholland in November of

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 136

1 2006?

2 A No.

3 Q And did you meet with anyone from the
4 government during that time, again, until the November
5 1st meeting?

6 A No.

7 Q Did you have e-mails with us, that is, with
8 the government, to coordinate the logistics of the
9 November 1st meeting?

10 A Yes.

11 Q But in those -- did we have any substantive
12 discussions until the November meeting?

13 A No.

14 Q Going to have to count a lot of pages here.
15 You're on --

16 A I think I'm on 5.

17 Q That says 5. So if you'll count to page
18 30.

19 A Okay.

20 Q And it may be page 29. It's the page that
21 at the very top says, Kevin McAnaney in bold, and then
22 under that, from Kevin McAnaney dated Saturday, June

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 137

1 18th, 2005 at 9:04 a.m.

2 A Yes. I see --

3 MR. ACKER: Has counsel found that?

4 MR. MULHOLLAND: Not yet.

5 MR. ACKER: E-mail at the top from Kevin
6 McAnaney dated Saturday, June 18, 2005 at 9:04 a.m.

7 MR. MULHOLLAND: June 18?

8 MR. ACKER: June 18, 9:04.

9 MR. MULHOLLAND: Let me just show it to you
10 to make sure I'm looking at the same one.

11 MR. ACKER: Yes.

12 BY MR. ACKER:

13 Q All right. Actually, again, oftentimes the
14 way e-mails show up when you print them out is the
15 latest message in a string is at the top and the
16 earlier messages are behind it; is that correct?

17 A Yes.

18 Q Let me have you look at the next page. And
19 at the bottom do you see -- or halfway down do you
20 see, it says, original message from Greg Smith, Greg,
21 sent Friday, June 17th, 2005 at 9:12 a.m.?

22 A Yes.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 138

1 Q And that says, Kevin and Tim, given that
2 the Indiana attorneys that worked on the JV were not
3 involved in the compensation arrangement, it would be
4 best to talk about the compensation arrangement and JV
5 separately. To discuss the compensation arrangement I
6 would be available late Tuesday, 3:00 p.m. or later,
7 and my day is more open on Wednesday. Maybe we could
8 schedule to talk about the JV next Thursday or early
9 Friday. I assume the Indiana attorneys will be on
10 that call. Tim, as discussed, I will e-mail you
11 shortly a summary of the Cejka compensation
12 arrangement appraisal issues we covered last week with
13 Cejka as well as the issues we did not get to address.
14 Greg.

15 Did I read that correctly?

16 A Yes.

17 Q So Greg Smith is asking that they have --
18 that you all have separate discussions about the
19 compensation arrangement and the joint venture
20 arrangement?

21 A Yes.

22 MR. MULHOLLAND: Objection, asks for

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 139

1 speculation.

2 BY MR. ACKER:

3 Q And if you'll look, then, on the previous
4 page, again, in the middle of the page, from Timothy
5 Hewson sent Friday, June 17th, 2005, at 4:20 p.m., he
6 says, let's plan on Wednesday at 11:00 a.m. for the
7 employment discussion. I will originate the call. I
8 have e-mailed Spratt and Heath about their
9 availability on Thursday.

10 Does this confirm your earlier statements that
11 there were separate discussions on the employment
12 issue and the joint venture issue?

13 A Yes.

14 Q And is it your recollection that the
15 joint -- excuse me -- the employment discussion for
16 the part-time employments was on the 22nd of June?

17 A Yes.

18 Q And the joint venture discussion was on the
19 23rd of June?

20 A Yes.

21 Q And that the representatives from
22 Hall Render law firm only participated on the second

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 140

1 call?

2 A Yes.

3 Q Okay. If you'll look two pages -- excuse
4 me -- let me count here -- about 12 pages further.

5 And the top says, "recovered re Tuomey hospital matter
6 from Kevin Barth." Are we on the same page?

7 A Yep.

8 Q Monday, October 16, 2006, 11:51.

9 A This must be it. Okay. Yeah.

10 MR. ACKER: Are you all on the same page?

11 The one that at the top says 11:51 a.m.

12 MR. MULHOLLAND: Yes, we have it.

13 BY MR. ACKER:

14 Q Okay. And, again, this appears to be a
15 response from an earlier e-mail. If you'll turn to
16 the next page, the next page there is an e-mail from
17 Kevin McAnaney sent Friday, October 13, 2006 at 3:18
18 p.m.?

19 A Yes.

20 Q Addressed to Mr. Acker. That's me.

21 A Yes.

22 Q Read the first sentence of that.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 141

1 A Mr. Acker, I received confirmation from
2 Mr. Daniel regarding Tuomey's waiver of the privilege
3 but have not yet heard back from Kevin Barth for
4 Palmetto Orthopaedic.

5 Q Tell me again what your recollection is of
6 the confirmation you received from Mr. Daniel
7 regarding Tuomey's waiver of the privilege.

8 A Well, I recall we had a back-and-forth for
9 a while. We were playing tag. And then I find -- I
10 mean, I left a message explaining what it was about.
11 And then at some point, which is probably right
12 before -- I think I e-mailed you probably right after.
13 We did speak. And he agreed that they waived the
14 privilege for me to meet with you and Dan in my
15 offices.

16 Q Okay. And what was your understanding of
17 what privilege was waived?

18 A Well, I -- I thought it was the privilege
19 as to the discussions that we had had with Tuomey and
20 Palmetto.

21 Q Would that include the attorney-client
22 privilege?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 142

1 A Oh, yeah, specifically the attorney-client
2 privilege. I mean, that's why I was calling. I
3 wasn't -- I mean, that is the privilege that I was
4 aware of. I actually -- I mean, I won't say waived
5 something else. That's all I was concerned with.
6 That's all my question was to.

7 Q Okay. And then in this e-mail you say you
8 haven't yet heard from Kevin Barth; is that correct?

9 A Yes.

10 Q Look on the previous page at the top, there
11 is an e-mail from Kevin Barth.

12 A Yes.

13 Q Is this just a few days later after the
14 Friday, October 13th e-mail?

15 A Yes.

16 Q This is the following Monday.

17 A (Nodding head up and down.)

18 Q Read what Mr. Barth wrote to you.

19 A Thank you for the e-mails. I do have the
20 authority to waive the privilege on behalf of
21 Dr. Drakeford and his practice and I do hereby waive
22 the attorney-client privilege on their behalf so that

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 143

1 you guys may speak with Mr. McAnaney. If you need
2 anything else, please let me know.

3 Q Can you just read the next two lines?

4 A With best regards, Kevin M. Barth.

5 Q Okay.

6 MR. ACKER: Let's take a break for a little
7 while.

8 (Proceedings recessed at 4:11 p.m.)

9 (In session at 4:50 p.m.)

10 BY MR. ACKER:

11 Q Mr. McAnaney, did anyone ever tell you why
12 you were chosen by Tuomey and Palmetto to give your
13 opinion on these contracts?

14 A Not that I recall.

15 Q Okay. When you were talking earlier at the
16 very beginning of your deposition about your jobs that
17 you've held, can you go into a little bit more detail
18 about what your role was at the Office of Counsel for
19 the Inspector General?

20 A Well, I was brought in to start following
21 the passage of the HIPAA, Health Insurance Portability
22 and -- Portability, Accountability and something Act.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 144

1 Anyway, Congress mandated that the secretary
2 issue advisory opinions on the -- on various issues
3 under the anti-kickback statute and other at least OIG
4 authorities. And I was brought in to run that group,
5 to start it, called the Industry Guidance Branch. And
6 so I founded it and did that. And in that capacity I
7 basically supervised that office. And we basically
8 did advisory opinions, special bulletins dealing with
9 the kickback statute and different authorities, and
10 also safe harbor regulations.

11 In addition, while I was -- well, that was
12 my -- those were my job responsibilities.

13 Q And what was your title there?

14 A Chief of the Industry Guidance Branch of
15 the Office of Counsel to the Inspector General.

16 Q And you started to say in addition you did
17 something else. What were you going to say?

18 A Well, I also worked on the Stark II
19 regulations. I basically was the principal drafter of
20 the Stark II, Phase I and Phase II regulations.
21 Although those were actually CMS regulations, not OIG
22 regulations.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 145

1 Q And are those the regulations that are --
2 that apply to the analysis of whether there is a Stark
3 problem with these contracts?

4 MR. MULHOLLAND: Objection to the form of
5 the question.

6 THE WITNESS: Well, yeah. I mean, they are
7 the regulations that implement the physician
8 self-referral law, the Stark Law, and so the
9 employment exception that we were talking about is in
10 the Stark -- it's in the Stark Law and then it's
11 further implemented in the Stark regulations.

12 BY MR. ACKER:

13 Q And is that the Stark regulations that you
14 helped to draft?

15 A Yes.

16 Q We skipped a page in here that I said we
17 would come back to, page 59 in Exhibit 1. And I just
18 wanted to touch base on that very quickly. This is an
19 e-mail from Greg Smith to Timothy Hewson dated May 16,
20 2005. Was this in your file that you produced to us?

21 A Yes.

22 Q And if you look at the third -- let me just

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 146

1 read the first few sentences of this e-mail.

2 Tim, the initial submission to Kevin regarding
3 the employment arrangement covers all the documents we
4 discussed. I assume Cejka will be doing the
5 valuation. Can you clarify Cejka's engagement
6 arrangements with Tuomey? If they were engaged to
7 design a physician employment strategy for which they
8 received a fee, their valuation will not be
9 independent since their appraisal will be of their own
10 work product.

11 That last sentence there is what I want to ask
12 you about. If they, that is, Cejka, were engaged to
13 design a physician employment strategy for which they
14 received a fee, their valuation will not be
15 independent since their appraisal will be of their own
16 work product. Did that issue come up in your
17 analysis?

18 A Not that I recall.

19 Q Did that issue come up in the discussions
20 that you had with Mr. Hewson?

21 A Not that I recall actually.

22 Q Okay. Did Mr. Hewson ever tell you that he

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 147

1 believed you didn't have all the facts necessary for
2 you to advise them?

3 A No.

4 Q Did Mr. Hewson ever tell you that he
5 believed your opinion had been poisoned by your
6 discussions with Greg Smith?

7 MR. MULHOLLAND: Objection.

8 THE WITNESS: No.

9 BY MR. ACKER:

10 Q Did Mr. Hewson ever tell you that he
11 thought that you had improperly spoken to Greg Smith
12 before the June 22nd meeting?

13 MR. MULHOLLAND: Objection.

14 THE WITNESS: No.

15 BY MR. ACKER:

16 Q And do you believe that your opinions that
17 you formed as of June 22nd, 2005 were poisoned by your
18 communications with Greg Smith?

19 MR. MULHOLLAND: Objection.

20 THE WITNESS: No.

21 BY MR. ACKER:

22 Q Did Mr. Hewson ever tell you -- I'm going

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 148

1 to withdraw that question.

2 During the time that you were working for
3 Tuomey and Palmetto in the summer of 2005, did you
4 form an opinion as to whether the Stark statute
5 applied to these proposed compensation arrangements?

6 MR. MULHOLLAND: Same objections as
7 previously put on the record regarding any opinions he
8 may have had.

9 THE WITNESS: I mean, yes.

10 BY MR. ACKER:

11 Q And what was that opinion?

12 MR. MULHOLLAND: Same objection.

13 THE WITNESS: That I think the Stark Law --
14 I mean, the Stark Law certainly implicated by the
15 arrangement.

16 BY MR. ACKER:

17 Q Why?

18 MR. MULHOLLAND: Same objection.

19 THE WITNESS: Well, because, as it was
20 described, it was an employment relationship that the
21 system was employing physicians who would be referring
22 to the hospital.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 149

1 BY MR. ACKER:

2 Q Did Tim Hewson ever tell you that he
3 thought Stark didn't apply?

4 A No.

5 Q Did Tim Hewson ever tell you that there was
6 no financial relationship between Tuomey and the
7 doctors?

8 A No.

9 Q Did Tim Hewson ever raise that as an issue
10 at all?

11 MR. MULHOLLAND: Objection.

12 THE WITNESS: Not that I recall.

13 BY MR. ACKER:

14 Q What, if anything, did Mr. Hewson say about
15 the application of the Stark Law to these proposed
16 contracts?

17 A I don't recall specifically. I think he
18 thought they complied.

19 Q Okay. Did he say what exception he
20 believed it fit in?

21 MR. MULHOLLAND: Objection.

22 THE WITNESS: Not that I recall.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 150

1 BY MR. ACKER:

2 Q Do you recall the interview that took place
3 on or about November 1 of 2006 where Mr. Mulholland
4 and I came to your office?

5 A Yes.

6 Q And was there any question in your mind as
7 of that date that both of your clients had waived the
8 attorney-client privilege?

9 MR. MULHOLLAND: Objection.

10 THE WITNESS: I was -- I was clear they had
11 both waived the privilege.

12 BY MR. ACKER:

13 Q And that was -- when you say they waived
14 the privilege, they waived the privilege as it related
15 to your joint representation of those two clients?

16 A Yes.

17 MR. MULHOLLAND: Objection to the form of
18 the question.

19 BY MR. ACKER:

20 Q Your answer was yes?

21 A Yes.

22 Q Let me draw your attention to page 73 of

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 151

1 Exhibit 1. I want to draw your attention to the very
2 bottom section. You see there is a double line, and
3 below that it says, very risky, noncompetete. And, I'm
4 sorry, I know you read this into the record before,
5 but could you just read that bottom section into the
6 record again?

7 A Okay. I think it says, very risky,
8 noncompetete, effectively precludes from practicing, if
9 can't perform outpatient surgery -- I mean outpatient.
10 And underneath it, term (how reasonable)? And
11 underneath that, history.

12 Q What portion of the Stark Law, if any, did
13 you consider this noncompetete and the term and the
14 history to be applicable to?

15 MR. MULHOLLAND: Objection to the form of
16 the question.

17 THE WITNESS: Well, I think the term -- I
18 would need to have the reg. in front of me. I'm not
19 necessarily sure they were particularly geared towards
20 the Stark. Although I think it may have been -- I
21 mean, to the extent there is a commercially
22 reasonable, not taking into account that it would

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 152

1 be -- even if there were no referrals between them --
2 but I can't recall exactly. I believe it's just --
3 the general commercial reasonableness of the
4 arrangement.

5 BY MR. ACKER:

6 Q And that commercial reasonableness is an
7 element of some of the exceptions to the Stark Law?

8 A Some of them.

9 MR. MULHOLLAND: Objection.

10 BY MR. ACKER:

11 Q And I believe your testimony earlier was
12 that the ten-year term of the agreement and the
13 three-year noncompete seemed long to you. Is that
14 your recollection of what you testified to earlier?

15 MR. MULHOLLAND: Objection.

16 THE WITNESS: Yes.

17 BY MR. ACKER:

18 Q And what was the relevance of your
19 statement that that seemed long to you?

20 MR. MULHOLLAND: Objection to the form of
21 the question.

22 THE WITNESS: Well, it's just -- I mean, the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 153

1 longer it is, the longer you're locking up a referral
2 stream.

3 BY MR. ACKER:

4 Q And did you tell that to Mr. Hewson in your
5 meeting on June 22nd, that you were concerned about
6 locking up referrals?

7 MR. MULHOLLAND: Objection.

8 THE WITNESS: I don't recall that. I think
9 I probably mentioned I thought the term seemed long
10 compared to most employment contracts.

11 BY MR. ACKER:

12 Q And do you know if you mentioned whether
13 the locking up of referrals was a concern?

14 A No, I don't recall if I said -- I mean, I'm
15 not sure I would have said that beyond just the term
16 made it look like it was -- potentially would be --
17 would raise a question.

18 Q And going back to page 73, you talk about
19 the noncompete, you talk about the term, but then you
20 also mentioned history. What's the relevance of the
21 history to the noncompete and the term, if any?

22 A Well, it's not so much that. It's to the

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 154

1 evaluation of the entire arrangement, someone coming
2 in cold. The government, certainly if you're looking
3 at the kickback statute as an intent-based statute,
4 and in determining what the intent is, they are going
5 to look at the history and the background to an
6 arrangement.

7 Q What part of the history did you think was
8 relevant to that question?

9 A Well, I thought the whole, beginning with,
10 as I said, this background about the ASC that was
11 there and how it's developed, and then having this
12 alternative -- I mean, so that's the background. And
13 then you have this alternative of perhaps this
14 outpatient surgery center or the employment contract
15 that, in general, looked like you were trying to find
16 a way to induce -- I mean, to get the physicians'
17 referrals.

18 Q Let me draw your attention to page 1 of
19 Exhibit A, page 006-1 of Exhibit 1, the very first
20 page. We talked about this earlier. "This" being the
21 letter essentially terminating your engagement; is
22 that correct?

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 155

1 A Yes.

2 MR. MULHOLLAND: Objection.

3 BY MR. ACKER:

4 Q Between the conference call that you had on
5 June 23rd and this date, what did you do concerning
6 the engagement? Did you do any work --

7 A I don't think I did any work. I think -- I
8 mean, yeah. If I had done, I would have billed them.

9 Q So your recollection is that you had the
10 conference call on the 22nd of June, the conference
11 call on the 23rd of June, then you received a request
12 to put the -- your opinion in writing, and then you
13 received this letter saying don't put it in writing.

14 MR. MULHOLLAND: Object to the form.

15 THE WITNESS: I'm not -- I don't think I
16 actually received a call to put it in writing. It was
17 that it was being -- it was being considered.

18 BY MR. ACKER:

19 Q Okay. But you -- you don't recall any more
20 work that you did between the 23rd and September 22nd.

21 A Right. My recollection was that the end of
22 those two calls was sort of -- I basically delivered

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 156

1 orally my assessment, and they said, well, they might
2 get back to me or something along that line --

3 Q Okay.

4 A -- if something further would be done.

5 Q Going back to page 73, the notes that we
6 made -- that you made at the bottom, the testimony
7 that you gave just a few moments ago about what you
8 meant by that and what you were concerned about that,
9 did you discuss those issues with Tim Hewson on June
10 22nd?

11 MR. MULHOLLAND: Objection. His testimony
12 speaks for itself.

13 THE WITNESS: Yes, I believe I did.

14 MR. ACKER: That's all the questions we
15 have.

16 MR. MULHOLLAND: Can we go off the record?

17 (Discussion was had off the record.)

18 (Proceedings recessed at 5:08 p.m.)

19 (In session at 5:15 p.m.)

20 MR. ACKER: The parties have discussed off
21 the record the possibility of continuing this
22 deposition for the cross-examination to a later date.

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 157

1 The witness has said that that is his preference. And
2 the parties have agreed that that will be done with
3 the -- the government would ask that -- has said that
4 its agreement is contingent upon the fact that there
5 will be no additional exhibits introduced other than
6 what's already been introduced, unless one of two
7 things happens: either some attachment, for the rule
8 of completeness, something needs to be included from
9 one of the exhibits or documents that's already been
10 introduced or if Tuomey's counsel notifies us within
11 the next week of a request for additional exhibits,
12 and, if they are reasonable, we will give reasonable
13 consent to that.

14 MR. MULHOLLAND: Those conditions are
15 acceptable to Tuomey. I just thought we might want to
16 get on the record that this is all right with the
17 witness.

18 Is that okay, Mr. McAnaney, the postponement of
19 your deposition or rather the continuance of your
20 deposition?

21 THE WITNESS: Yes.

22 (Proceedings recessed at 5:16 p.m.)

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 158

1 (Signature having not been waived, the
2 deposition of KEVIN MCANANEY, ESQUIRE recessed at 5:16
3 p.m.)
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

Kevin G. McAnaney, Esq.

October 9, 2008

Washington, DC

Page 159

1 ACKNOWLEDGMENT OF DEPONENT

2

3

I, KEVIN MCANANEY, ESQUIRE, do hereby

4

acknowledge that I have read and examined the

5

foregoing testimony, and the same is a true, correct

6

and complete transcription of the testimony given by

7

me and any corrections appear on the attached errata

8

sheet signed by me.

9

10

11

12

13

(Date)

(Signature)

14

15

16

SUBSCRIBED AND SWORN TO before me this _____ of

17

_____, 2008.

18

19

20

(Notary Public)

21

My Commission Expires:

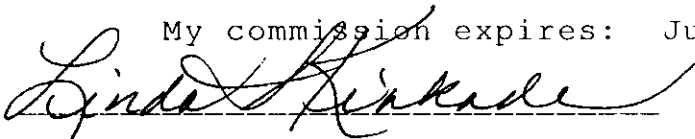
22

1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

2
3 I, Linda S. Kinkade, Registered Professional
4 Reporter, Registered Merit Reporter, Certified
5 Shorthand Reporter, Certified Realtime Reporter, and
6 Registered Diplomate Reporter, the notarial officer
7 before whom the foregoing proceedings were taken, do
8 hereby certify that the foregoing transcript is a true
9 and correct record of the proceedings; that said
10 proceedings were taken by me stenographically, to the
11 best of my ability, and thereafter reduced to
12 typewriting; and that I am neither counsel for or
13 related to, nor employed by any of the parties to this
14 case and have no interest, financial or otherwise, in
15 its outcome.

16 IN WITNESS WHEREOF, I have hereunto set my hand
17 and affixed my notarial seal this 12th day of MARCH
18 2010.

19 My commission expires: July 14, 2012

20 

21 NOTARY PUBLIC IN AND FOR

22 THE DISTRICT OF COLUMBIA